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# THE MICHIGAN LAW
OF
# Marriage and Divorce
WITH
## FORMS OF PROCEDURE CONFORMING TO THE MICHIGAN JUDICATURE ACT

BY
JAMES M. POWERS
OF THE
BATTLE CREEK BAR

1917
DETROIT
FRED S. DRAKE

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# PREFACE.

The object in writing this book has been to gather under one heading all the law, procedure and forms of this jurisdiction relating to the subject of marriage and divorce and to supplement, by decisions in foreign jurisdictions, such points as have not been determined by our Supreme Court. Upon questions relating to conflict of laws it has been deemed advisable to add the decisions of the various states, and, in some of their more important phases, a brief review of the laws of such states and of other countries in their comparative relation to our own.

It is the increased litigation concerning the marriage relations and particularly matters of divorce, together with the trend of the courts to follow the decisions of their own jurisdiction, that has made such a treatise necessary. The subject is so important, and some of the questions so complicated and difficult, that it is only in this form that such questions can be discussed and solved.

My gratitude is due Mr. Horace G. Williams of the Detroit bar for his valuable suggestions and criticisms.

With the sincere hope that it will be of interest and value to the profession, this work is respectfully submitted to the bench and bar.

Battle Creek, June 1, 1917.

JAMES M. POWERS.

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# PART ONE

# MARRIAGE AND ITS SOLEMNIZATION

## PART ONE—MARRIAGE AND ITS SOLEMNIZATION.

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# CHAPTER I.

## INTRODUCTION.

§1. Definition.
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§10. Consent the Essence of a Valid Marriage.
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### §1. Definition.

Marriage is the union of a man and woman in the legal relation of husband and wife. The term includes both the act which creates the union, and the union itself as the resulting status of the parties. In one form or another, it is the oldest social institution known to the world, and is the source of its most ancient social laws. Society, indeed, could not long exist without some rules imposed by the law of necessity for the appropriation of man and woman to one another, securing them in the enjoyment of each other's society, and defining their duties and obligations, each to the other and both to their offspring.

### §2. Monogomy.

According to the law or practice of the greater part of the civilized world, one man marries and becomes the husband of only one woman at a time, which Christ declares to be the fundamental law of God, given in the institution of marriage at the creation of man. This reference of marriage to the highest conceivable origin, which has an essential relation to the characteristic purification of it, the Apostle Paul develops for guidance in the practical duties of the wedded state, bringing to light the formative principle of wedlock as the great earthly symbol of the sacred "mystery" of the union of the Son of God with humanity. "For this cause (that is, since the Son of God left the Father that he might join himself with our flesh) shall a man leave his father and mother and cleave to his wife, and the twain shall become one flesh."[1]

### §3. Primitive Marriage—Polygamy.

The Mormon heresy on this subject has been practically suppressed by the enactment and enforcement of salutary laws. But the familiar system of monogomy is a comparatively recent development of marriage. With those who reject the Christian records, a great diversity of opinion exists as to the particular form of primitive marriage. It is conceivable that many forms may have been introduced at a very early period.

Polygynia—one man with many wives, and polyandria—one wife with many husbands, have certainly been in existence. It has frequently been asserted that intercourse was originally promiscuous.[2] This negation of marriage has been and still is vehemently disputed, and with excellent reason. The same authority also affirms a primitive custom of intermarriage between brothers and sisters, the consanguine family of the Malay civilization, and a custom of intermarriage of several sisters with each other's husbands and of several brothers with each other's wives. This custom is said to have resulted in the formation of a gens,[3] governed in its marriage relations by the principle of exogamy. After this comes the marriage of single pairs, with or without exclusive co-habitation. To speak of these related customs as ancient, rather than as primitive, is more in accordance with such evidence as exists. It is impossible to prove the earliest of them primitive; that is, the original custom.

The patriarchal families were largely polygamous, and after them true monogamy does not appear in any general development before the rise of private property, lineal succession and slavery.

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[1] Eph. V. 22-33.

[2] Morgan's Systems of Consanguinity and Affinity.

[3] A word used by the Romans to represent race and nation. In the French law it is used to signify people or nation.

## §4. Primitive Ceremonies of Marriage.

The primitive marriage ceremonies are immense in number and some of them of striking beauty.

As regards Christian Europe, in A. D. 1085 Hildebrand declared marriage a sacrament and at the reformation Calvin declared it an institution of God. The school of Grotius described it as a contract of partnership. In all countries marriage is quite generally, though not always, accompanied by a religious ceremony of more or less formality.

## §5. Marriage a Contract.

In the eye of the law, even where, on public grounds, the intervention of a minister of religion is declared essential, marriage, considered as the act which forms the union, is a contract. While the law deals with marriage as a contract, there has been, and still is, much controversy whether it really is a contract, and, if so, then to what class of contracts it belongs. For, though consent of both parties—one chief essential of all contracts—is universally a requisite to a legal marriage, yet all of the incidents of the condition and status of the parties, which the act of consent constitutes and creates, are fixed by positive law.

Some confusion of thought may be due to the use of the term marriage to denote both the contracting act and the status which that act creates. In the United States it has been decided that marriage is not a contract within the meaning of that provision of the Federal constitution which prohibits legislation impairing the obligation of contracts. The peculiar relation of the several states to the Federal government occasions difficulty on this point.

In many of the states marriage is declared by statute to be a civil contract, so far as its validity is concerned. This statutory declaration means no more than that to constitute a valid marriage the agreement and consent of both parties must exist, and, like all other contracts, that agreement and consent must be made and given by competent parties. The language employed in the Michigan statute is: "Marriage, so far as its validity is concerned, is a civil contract, to which the consent of parties capable in law of contracting is essential."[6]

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[4] Selection of wives outside the gens.

[5] McLennan, Primitive Marriage, 2nd Ed., Early History of Mankind, Lubbock's Origin of Civilization.

[6] C. L. '15, (11363); Howell 2nd Ed. §11424.

It is plain, however, that while marriage is legally termed a contract, it is distinguished from all other contracts, inasmuch as in the latter the parties assign and determine their rights and duties substantially at their own choice, while in marriage the law determines practically all the rights and duties which are elements of the new relation.

## §6. Government Control Over Marriage.

Each sovereign nation, kingdom or empire of the civilized world has the right to regulate and control the marriage of its domiciled citizens, and the rights, duties and obligations arising from marriage relation.

The British parliament has enacted laws relating to marriage that differ materially for the different divisions of the empire. Sole power over marriage in the Dominion of Canada was delegated to the Dominion Parliament, by the law known as the British North American Act. While the Canadian Dominion Parliament has the sole power to pass laws as to the legal qualifications of parties to a marriage and offenses against the marriage relation, as well as providing for the punishment therefor, it is conceded that each provincial legislature in Canada has power to enact legislation governing the form of marriage within its own province, and not repugnant to, nor conflicting with, the federal laws of the Dominion.[7]

The British Parliament, by an act known as the Commonwealth of Australia Constitution Act, has also delegated to the Australian Commonwealth Parliament the power to enact uniform marriage laws for the whole of Australia. The Australian Parliament, however, has not enacted any legislation under this delegated power, and the marriage laws of the different states of the Australian Commonwealth are very dissimilar. Germany, France, and a large number of the other nations of Europe, have uniform marriage laws.[8]

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[7] British Columbia R. S. 1897, Ch. 129, Sec. 24; R. S. Manitoba, 1902, Ch. 173; Alberta Statutes, 1908, Ch. 20, Sec. 23; R. S. Saskatchewan, 1908. Ch. 22; Cons. Statutes of Nova Scotia, 1900, Tit. 17; R. S. of Ontario, 1897, Ch. 162; Scott v. Scott, 4 British Columbia R. 316; Legislative Power in Canada, P. 488.

[8] Commonwealth Australia Act (63 & 64 Vict. Ch. 12); Miller v. Major, 4 Austr. C. L. R. 219; Parker v. Parker, 5 Austr. C. L. R. 691.

## §7. Mode of Constituting Marriage in England.

In England, to insure deliberation, and to preserve indisputable evidence of so important a fact, English law makes certain formalities essential to marriage. A breach of the contract to marry gives rise to an action for damages, but the marriage itself will not ordinarily be treated as null merely because either party procured it by fraud or misrepresentation.

Another feature in which marriage in England and in some of the states differs from other contracts is that it cannot be consummated in a moment by the act of the parties, but certain preliminary notices must be given and certain formalities observed.

In England, since 1836, persons have the option of contracting marriage either with or without a religious ceremony. If the former, it may be either in the established church or in a dissenting chapel. If it is to take place in the established church, there must be a publication of banns of marriage for three successive Sundays, but a marriage license obtained from the ordinary of the district will dispense with publication of the banns. The marriage must take place in the church, and the marriage service of the Church of England must be read over, both within the canonical hours, that is between eight and twelve o'clock A. M., in the presence of at least two witnesses.

If the marriage is to be celebrated in a dissenting chapel (and for that purpose such chapel must be duly licensed and registered), a certificate or license must be procured after notice from the registrar of the district, who must be present as one of the witnesses, except in the case of Quaker or Jewish marriages. If the marriage is without religious ceremony, it must take place in the office of the registrar of the district, and in the presence of two or more witnesses. Both parties, in the presence of the witnesses, must declare that they take each other as husband and wife, the canonical hours being observed in all cases. The omission of any of these requisites, with the knowledge of the parties, makes the marriage void.

It is a felony to celebrate a marriage in a private house, unless by special license from the archbishop. In all cases the fact of the marriage must be entered in a church register, also in a civil register, the latter being filed and kept in Somersett House in London, where a copy of the certificate of registration may be had for a small sum. Making or signing a false declaration on giving notice to the officials of the intended marriage is made perjury by law. In the case of marriage of persons under twenty-one years of age, evidence of the consent of parents or guardians must be produced to the registrar or other officer. There are penalties imposed for false representations of such consent, but the lack of consent of parents or guardians does not make the marriage void. The marriage of Quakers and Jews is subject to peculiar legislation. Such marriages need not be in a registered building, and the registering official of the Quakers or the secretary of Jewish synagogue, is authorized to be present instead of the registrar.

### §8. Mode of Constituting Marriage in Scotland.

In Scotland the maxim of the civil law, *consensus non concubitus facit nuptiam*—consent, not lying together, constitutes marriage—has been adopted, and this consent can be proved either by a regular ceremony evidenced by a public record, or in three other modes known to the law.

The chief impediments to this consent are nonage, insanity, impotency, consanguinity within the prohibited degrees, existing marriage, and themselves, adultery, in the case of the adulterers. The marriage is null if force has been used, or an error in belief as to the woman's chastity has been caused by her misrepresentations or concealment, or a mistake of personal identity occurs, or a fraudulent conspiracy has been formed which brought about the marriage.

The three other modes referred to for proving consent, besides that of the regular ceremony, are known as irregular marriages. Such marriages are constituted by consent which is proved by a written or verbal declaration of interchange of consent by a promise to marry, on the faith of which intercourse has followed, or by co-habitation, habit, and general repute.

Proclamation of banns in the parish church is required for a regular marriage, but, by certain formalities, a certificate may be procured from the registrar which will be sufficient authority for a minister, clergyman or priest to celebrate a regular marriage in the same manner as in the case of a certificate of proclamation of the banns in the parish church. No minister of the established church of Scotland, however, is obliged to celebrate a marriage not preceded by proclamation of the banns. Where objection is made to the marriage on the ground of legal capacity to marry, or any legal impediment to marriage, the registrar is forbidden to issue a certificate until there has been produced the judgment of a court of competent jurisdiction overruling the objection.

### §9. Mode of Constituting Marriage in the United States.

The law of marriage in the United States is far from being settled or uniform, but is now, and for a considerable period of time has been, in a transitory condition. There has been, and still is, much discussion looking toward a uniformity of marriage and divorce laws, but as yet very little progress has been made, if any. The conception of marriage held by many jurists in the United States differs materially from that of the Roman Church, which elevates it to a sacrament, also from the statutory one which makes it nothing more than a contract. In the language of Judge Story, "It is more than a contract; it is an institution founded upon the consent and contract of the parties, and has peculiarities in its nature, character and operation, different from what belongs to ordinary contracts." This view of marriage as something more than a mere contract is of special importance in the United States, because of the numerous questions arising relating to marriage and divorce under conflicting laws in fifty or more independent jurisdictions. Under the Federal constitution, each state has full power to pass laws governing marriage in its own jurisdiction, and the laws of each state are very dissimilar.

The Federal Congress has supervisory control over the territorial legislatures as to the marriage laws of each territory, and full legislative control on the subject in the District of Columbia.[9]

### §10. Consent the Essence of a Valid Marriage.

In the United States, as well as in all civilized nations, consent is of the very essence of the marriage contract. There can be no valid marriage by those who have not sufficient mentality to consent, such as idiots or insane persons. So a marriage procured by force or fraud may be annulled. If another husband or wife of either of the parties is living at the time of the celebration of a marriage, such marriage is void. To make a valid marriage, each of the parties must have attained the age of consent. This varies in different states, ranging from sixteen to eighteen years for males and from twelve to sixteen years for females.

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[9] Federal Statutes, Annot., Vol. 1, p. 704; Vol. 2, p. 838; Cross v. Allen, 141 U. S. 528, 12 Sup. Ct. R. 67, 35 L. Ed. 843; Sims v. Sims, 175 U. S. 162, 20 Sup. Ct. R., 58 L. Ed. 115; Sistaire v. Sistaire, 218 U. S. 1, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 30 Sup. Ct. R. 682; De la Rama v. De la Rama, 201 U. S. 303, 50 L. Ed. 765, 26 Sup. Ct. R. 405; Travers v. Reinhardt, 205 U. S. 423, 51 L. Ed. 865, 27 Sup. Ct. R. 563; In re Lando 112 Minn. 127 N. W. 1125, 30 L. R. A. (N. S.) 940; Garcia v Garcia, 25 S.

The consent of parents or guardians of minors is required by the statutes of some of the states. Whether such a marriage without consent of parents or guardians would be void depends largely upon the statutes of the different states. In some it is declared void, in others voidable only. The distinction between void and voidable marriages exists in all the states. A void marriage is a *nullity ab initio* and its validity may be impeached in any court and at any time, in either a direct or a collateral proceeding. A voidable marriage, however, is valid until a competent tribunal has pronounced it void in a direct proceeding for that purpose. It cannot be impeached collaterally. In most of the states, relationship within the prohibited degrees of consanguinity or affinity renders a marriage void, while such causes as nonage, insanity, fraud, duress and physical disability render it voidable only. The effect of this distinction is upon the status of the parties when void the relationship is unlawful from the beginning; when voidable it is lawful until the marriage is dissolved by court of competent jurisdiction.

## §11. Marriage Ceremonies.

The laws of many of the states render certain solemnities indispensable in the celebration of marriage, though informal, or what is known as common law marriages, have to quite a large extent been recognized by the Federal courts and by the courts of many of the states. A present agreement between competent parties to take each other as husband and wife, followed by actual and open co-habitation pursuant to its terms, is generally regarded as constituting a valid marriage. Such a marriage, in a contest, becomes the subject of proof, and

D. 645, 127 N. W. 586, Ann. Cas. 1912 C, 621, 32 L. R. A. (N. S.) 424; State v. Shattuck, 69 Vt. 403, 40 L. R. A. 428, 60 Am. St. R. 936, 38 Atl. 81; In re Chace, 26 R. I. 531, 69 L. R. A. 493, 58 Atl. 978, 3 Ann. Cas. 1050.

may be proved by showing actual co-habitation as husband and wife, acknowledgment, declarations, conduct, repute, reception among neighbors, and the like. But the words of the agreement must not be *verba de futuro;* such an agreement gives only cause for an action for breach of promise to marry. If, however, an agreement in *verba de futuro* is followed by consummation a legal presumption is raised that the words *de presenti* afterwards passed between the parties, and unless this presumption is overcome by proof the marriage will be sustained.

The formal marriage throughout all the states consists in having the celebration take place before a clergyman or before some civil officer designed by the statute. So far as forms and ceremonies are concerned, it is a general rule that the validity of the marriage is to be determined by the law of the state in which it is solemnized.

### §12. Jurisdiction in Matrimonial Causes.

In the United States, jurisdiction in all matrimonial causes is generally vested in courts of equity or in courts having equitable jurisdiction and powers.

In some of the states the distinctions between legal and equitable jurisdiction have been abolished so far as it is possible to do so, but in many respects such distinctions are so marked that they cannot wholly be obliterated. In other states such distinctions are retained, but both legal and equitable jurisdiction vested in the same court.

The character of the questions which arise in matrimonial causes, and the nature of the remedy to be afforded, are peculiarly within the functions of courts of equity, and in most states, if not in all, such causes are disposed of in courts having that jurisdiction.

### §13. Property Rights of Husband and Wife.

Within comparatively recent years the common law as to property rights of husband and wife have been materially changed by statutes, familiarly known as the "married women acts," have been adopted to a greater or less extent in all of the states. By these acts married women have been empowered to hold real and personal property, with the same right as unmarried women to its management, control and disposition, to carry on business on their own account for their own exclusive benefit, and to make enforceable contracts in relation to their separate property and the conduct of their business.

In most of the states married women may sue and be sued in their own name, without joining their husbands, although in some of the states it is still necessary to join the husband in an action against the wife in certain actions of tort.

During co-habitation, the law, from that circumstance, presumes the assent of the husband to all contracts made by the wife for necessaries which are suitable to the husband's degree and estate. Even though the husband be a minor, he is liable for necessaries furnished to his wife and family, their interests being considered as identified with his. Contracts in restraint of marriage are wholly void.

# CHAPTER II.

## CONFLICT OF LAWS RELATING TO MARRIAGE AND DIVORCE.

§14. Foreign Marriages.
§15. Marriages against Public Policy and Morality.
§16. Incestuous and Polygamous Marriages.
§17. Incestuous Marriages.—Void or Voidable.
§18. Who May Ask for Annulment of Voidable Marriage.
§19. Marriage After Divorce Granted.
§20. Marriage During Prohibited Period.
§21. Protection of Injured Party and Offspring of Illegal Marriage.
§22. Modern Legislation.
§23. Conflict of Divorce Laws.
§24. Full Faith and Credit Clause of the Federal Constitution.
§25. Effect Same as in State where Judgment is Rendered.
§26. Written Laws of Foreign Countries.—How Proven.

### §14. Foreign Marriages.

As a general rule, so far as concerns the form of the ceremony, the validity of a marriage between persons domiciled in the jurisdiction in which the marriage is celebrated, or between persons not so domiciled, is governed by the law of the place where the marriage is celebrated, and if valid there it is valid everywhere.[1] But to entitle a marriage, performed according to a custom of one jurisdiction, to be recognized in another, both parties must have been within the former jurisdiction at the time of the celebration of the marriage. Thus, though Chinese custom and Chinese law are said to permit marriages by proxy, yet a Chinaman domiciled and actually in the United States, having married by proxy a girl in China according to the Chinese custom, the marriage was held invalid in the United States, although recognized as valid by Chinese law and custom.[2]

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[1] The following cases arranged as to jurisdiction:
England. Brook v. Brook, 9 H. L. Cas. 193.
Canada. Burocher v. Degre, 20 Quebec Sup. Ct. 456.
United States. Patterson v. Gaines, 6 How. 550, 12 L. Ed. 553.
Alabama. Wall v. Williamson, Ala. 48; Wells v. Thompson, 13 Ala. 793.
California. Pearson v. Pearson, 51 Cal. 120.
Georgia. Eubanks v. Banks, 34 Ga. 415.
Kentucky. Dumarsley v. Fishley, 3 A. K. Marsh (Ky.) 368; Kleinke v. Noonan, 20 Ky. L. R. 305, 81 S. W. 241.
Maine. Hiram v. Pierce, 54 Me. 367.
Maryland. Redgrave, 38 Md. 93; Jackson v. Jackson, 80 Md. 176, 82 Md. 17, 30 Atl. 752, 33 Atl. 317.
Massachusetts. Medway v. Needham, 16 Mass. 167; Sutton v. Warren, 10 Met. (Mass.) 452; Commonwealth v. Lane, 113 Mass. 458.
Michigan. Hutchins v. Kimmel, 31 Mich. 126; Kobogum v. Iron Co. 76 Mich. 498; 43 N. W. R.

On the other hand, if a marriage is invalid in the jurisdiction in which it is celebrated, as a general rule it will be held invalid elsewhere.[3] But it has sometimes been held that this rule does not apply to nonresidents and temporary sojourners in the place where the marriage ceremony is performed, who marry with the intention of returning to the place of their residence.[4]

## §15. Marriages against Public Policy and Morality.

Where in one jurisdiction marriages between certain persons

602; People v. Loomis, 106 Mich. 250, 64 N. W. R. 18.
Minnesota. McHenry v. Bracken, 93 Minn. 510, 101 N. W. R. 960.
Missouri. Johnson v. Johnson, 30 Mo. 72 (Indian Marriage); Boyer v. Diveley, 58 Mo. 510 (Indian Marriage); LaRivier v. LaRivier, 97 Mo. (Indian Marriage), 10 S. W. R. 840.
Nebraska. Gibson v. Gibson, 24 Neb. 394; Hills v. State, 61 Neb. 589, 85 N. W. R. 836.
New Hampshire. True v. Ranney, 21 N. H. 52.
New Jersey. Harral v. Harral, 39 N. J. Eq. 279; Clark v. Clark, 52 N. J. Eq. 650, 30 Atl. R. 81; Smith v. Smith, 52 N. J. L. 207, 19 Atl. R. 255.
New York. Wolrich v. Freeman, 71 N. Y. 601.
North Carolina. State v. Ross, 76 N. C. 242; State v. Behrman, 114 N. C. 797, 19 S. E. R. 220.
Ohio. Evans v. Reynolds, 32 Ohio St. 163.
Pennsylvania. Phillips v. Gregg, 10 Watts (Pa.) 158.
Tennessee. Morgan v. McGhee, 5 Humph. (Tenn.) 13 (Indian Marriage).
Vermont. State v. Shattuck, 69 Vt. 403, 28 Atl. 81.

[2] In re Lum Lin Ying, 58 Fed. R. 682.

[3] McDeed v. McDeed, 67 Ill. 545 (Minors); Simmonds v. Allen, 33 Ill. App. 512; Carrale v. People, 177 Ill. 219 (Minors); Roche v. Washington, 19 Ind. 53; Blaisdell v. Brickum, 139 Mass. 250 (Uncle and niece) 1 N. E. R. 281; Hutchins v. Kimmell, 31 Mich. 126; Smith v. Woodworth, 44 Barb. (N. Y.) 198; Matter of Hall, 11 Atl. R. 221; Weinberg v. State, 25 Wis. 370.

[4] Loring v. Thorndike, 5 Allen (Mass.) 257; Clark v. Clark, 52 N. J. Eq. 650 (Marriage performed in Indian Territory) 30 Atl. R. 81; Wilcox v. Wilcox, 46 Hun (N. Y.) 32.

are prohibited by public policy and the law as offensive to the morals and good order of society, such marriages, performed in another jurisdiction, will not be deemed valid therein, though they may be valid by the law of the state or country where they are celebrated, and though the parties to the marriage are there domiciled.[5] In the state of Tennessee this rule has been applied to marriages between white persons and negroes.[6] The Tennessee rule, however, making marriages between white persons and negroes invalid, even though contracted in good faith, in a state or country where such marriages are permitted and are valid, does not seem to be followed in many of the states, nor in Christian nations in general.[7]

## §16. Incestuous and Polygamous Marriages.

While the rule upholding in one jurisdiction the validity of a marriage of nonresidents which is valid in the jurisdiction where it is celebrated, has been applied to marriages between persons who by reason of consanguinity or affinity are incompetent to marry,[8] still if a marriage is incestuous or polygamous, according to the general opinion of Christendom, though valid in the jurisdiction where celebrated, it will not be held valid in those jurisdictions where such marriages are prohibited.[9]

This exception to the general rule is a most salutary one and seems to have come into use for the necessary protection of society and good morals. Its operation and effect is upon the very foundation of society, public policy and morality. Without this beneficent exception, the Turk or Mohammedan, with his numerous wives, might establish his harem at the very doors of our Christian churches, and we would be without remedy. We might have among us a father living with his daughter, a son living with his mother, and a brother living with his sister, in lawful wedlock, because they had formed that relation in a country where such unions were lawful.

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[5] Pennegar v. State, 87 Tenn. 244.

[6] State v. Bell, 7 Baxt. (Tenn.) 9; Pennegar v. State, 87 Tenn. 244; State v. Tutty, 41 Fed. R. 753.

[7] State v. Ross, 76 N. C. 242; Pearson v. Pearson, 51 Cal. 120.

[8] Greenwood v. Curtis, 6 Mass. 338; Sutton v. Warren, 10 Met. (Mass.) 451 (aunt and nephew). But see U. S. v. Rogers, 109 Fed. R. 886 (Russian marriage between uncle and niece held invalid in Pennsylvania); State v. Brown, 47 Ohio St. 109 (uncle and niece); Martin v. Martin, 54 W. Va. 301, 1 Am. & Eng. Ann. Cas. 612 (aunt and nephew).

[9] Campbelle v. Crampton, 2 Fed. R. 426; Stimson v. Gage, 17 Civ. Stat. S. C. (1893) Sec. 2157; 1 Stimpson's American Statute B. Mon. (Ky.) 193; Jackson v. Jackson, 82 Md. 29; Greenwood v. Curtis, 6 Mass. 358; Medway v. Needham, 16 Mass. 157; Sutton v. Warren, 10 Met. (Mass.) 451; True v. Ranney, 21 N. H. 52.

## §17. Incestuous Marriages.—Void or Voidable.

In England, and in many of the states of the Union, marriages between relations of the forbidden degrees are void.[10] In other states such marriages are treated as voidable only.[11] Whether marriages of persons within the prohibited degrees of consanguinity are absolutely void or are merely voidable is frequently determined by statutory enactment. The earlier rule seems to have been that such marriages were voidable only, and could not be attacked except during the lifetime of the parties, and then only by the parties themselves or one of them.[12] In England, however, as early as 1835, such marriages were held to be null and void, and not merely voidable.[13] The early American cases quite generally held marriages within the prohibited degrees to be merely voidable.[14] But the modern tendency seems to be to hold such marriages void, and many states have adopted statutory regulations definitely establishing this rule.[15]

In Michigan, all marriages which are prohibited on account of consanguinity or affinity between the parties are absolutely void without any decree of divorce or other legal process, but the issue of such marriages is deemed legitimate.[16] In New Hampshire, marriages between cousins are considered incestuous, and are held to be void without the necessity of any decree of divorce or other legal proceeding to terminate them.[17] In Pennsylvania it appears that such marriages are only voidable.[18] In Louisiana it has been held that although a marriage between a man and his niece is null and void, because contracted in violation of a law prohibiting such unions, yet where one of the spouses acted in good faith, it will have for certain purposes the effect of a legal marriage, so far as concerns such spouse and the issue of the marriage.[19]

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[10] 19 Am. & Eng. Ency. of Law, 2nd Ed. 1175.

[11] Martin v. Martin, 54 W. Va. 301, 1 Am. & Eng. Ann. Cas. 612.

[12] Bowers v. Bowers, 10 Rich. Eq. (S. C.) 551.

[13] Brook v. Brook, 9 H. L. Cas. 233.

[14] Adkins v. Holmes, 2 Ind. 197; Stevenson v. Gray, 7 B. Mon. (Ky.) 215; Sutton v. Warren, 10 Met. (Mass.) 451; Boylan v. Deinzer, 45 N. J. Eq. 485; Bowers v. Bowers, 10 Rich. Eq. (S. C.) 551; Parker's Appeal, 44 Pa. St. 309.

[15] Stat. Ky. 1894, Sec. 2096; Law, Sec. 6112.

[16] C. L. '15, (11392); Howell (2nd Ed.) §11453.

[17] Hayes v. Rollins, 68 N. H. 191, 44 Atl. R. 176; Blaisdell v. Buckum, 139 Mass., 1 N. E. R. 281, construing New Hampshire statute.

From these cases, and many more which might be cited, it clearly appears that the laws of the several states are widely different on the subject of whether certain marriages are void or only voidable. This condition of the law, and the conflicting statutory provisions of the several states, emphasize the necessity of general uniform rules by which it may be determined whether a particular marriage is valid, void or voidable. It seems to have been generally determined that the safest and best rule to follow, the one which will have the best effect for the protection of society and public morals, is to hold, subject to the exceptions already noted, that a marriage which is valid in the jurisdiction where it is solemnized is valid everywhere; that one which is void by the law of the state where it is celebrated is void everywhere, and that one which is voidable merely by the law of the state where it is celebrated is valid everywhere until it is annulled by a tribunal of competent jurisdiction during the lifetime of the parties.

## §18. Who May Ask for Annulment of Voidable Marriage.

There can be no doubt of the right of the injured innocent party to a voidable marriage to maintain an action for the annulment of such marriage. The difficulty arises when both parties entered into the relation knowingly. This difficulty presents itself most often, and perhaps only, in those cases where by the law of the jurisdiction where the marriage was celebrated the relationship of the parties is such that the marriage is prohibited, but still is not absolutely void, but merely voidable. Actions for the annulment of a voidable marriage, as well as divorce actions, are almost universally brought and disposed of in courts of equity or courts having equitable jurisdiction. It has often been stated, and it is a general rule, that one who comes into a court of equity, seeking the aid of the equitable power of the court, must come with clean hands, and it would seem that this cannot be done when both parties are equally unclean. While the laws of the different states are notably in conflict, as to the application of this rule to proceedings for the annulment of voidable marriages, the better and more reasonable view seems to be that such a case is an exception to the equitable maxim above mentioned. For instance, in Pennsylvania marriages between uncle and niece are prohibited, but such marriages are by the law of that state not absolutely void, but merely voidable. They are valid to a certain extent until annulled by a court of competent jurisdiction. By the laws of the state of Michigan such marriages are absolutely void without any decree of divorce or other legal process. But the marriage being lawful in the state where it was celebrated until it is annulled by a court of competent jurisdiction, it must be treated as valid for certain purposes everywhere so long as it remains not so annulled. Now, suppose a man marries his niece in the state of Pennsylvania, cohabits with her there, and then removes with her to the state of Michigan and they there acquire a domicile in good faith. If the marriage had been celebrated in Michigan it would be absolutely void, and cohabitation would subject the parties to a criminal prosecution, but being valid until annulled in the state where it was celebrated, it must be so treated in Michigan. When the parties have acquired a domicile in the state of Michigan, in good faith, will a court of equity entertain a bill to annul the marriage on the application of one of them?

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[18] Person's appeal, 44 Pa. St. 309; Walter's Appeal, 70 Pa. St. 392.

[19] Burssier's Succession, 41 La. Ann. 218; Revised Civil Code, La. (1900) Art. 117-118.

This is a troublesome question, and on first impression it would seem that the equitable maxim above mentioned would demand an answer in the negative. But when we stop to consider that in all divorce and annulment cases there are at least three interested parties, the plaintiff, the defendant, and the public, a somewhat different view is presented. The parties are living in a relation not only unlawful according to the laws of the state where they reside, but abhorrent to good morals. Their influence and example is bad. Their lives are unclean. Neither can come before a court of equity with clean hands. But if one or even both of them desire to dissolve the unlawful and immoral relation; if they desire to go and sin no more and not permit their uncleanliness and immorality to continue a stench in the nostrils of the public and a menace to public morals, it would seem that they ought to be permitted to do so.[20]

### §19. Marriage After Divorce Granted.

A question which often arises because of the conflicting marriage and divorce laws of the several states, and which deserves notice and careful attention, is under what circumstances a decree of divorce becomes effectual to the extent that the parties or one of them may marry again. In some states the trial court, upon granting a decree dissolving a marriage, is given a discretion to prohibit both or either of the parties from marrying again for a period of time stated in the decree, not longer than the period fixed by the statute. In other states the statute fixes the time within which neither party is permitted to marry again. In still others the statute prohibits the guilty party from marrying again during a stated period. In others the statute prohibits both parties from marrying again until after the time for appealing from the decree has expired, and in case an appeal is taken neither party is permitted to marry again until after the appeal is disposed of in the appellate court.

In some states the decree of divorce does not become absolute until the expiration of a specified period after it is entered, during which time both parties are forbidden to marry again. In several the first decree is *nisi*, and an absolute divorce is not granted until the plaintiff makes a second application in the manner pointed out by the statute. In others the order *nisi* becomes absolute automatically upon the expiration of the time limited, unless vacated upon the application of one of the parties before the expiration of the time limit.

In a number of states either party may marry again as soon as the decree is signed and entered in the records of the court, at the peril, however, of the decree being reversed by an appellate court in case an appeal is taken.[21] These widely different and conflicting laws frequently give rise to difficult and perplexing questions, and emphasize the necessity for uniform marriage and divorce laws in the different states and territories.

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[20] Martin v. Martin, 54 W. Va. 301, 46 S. E. R. 120, Am. & Eng. Ann. Cas. 612; 19 Am. & Eng. Ency. of Law, 2nd Ed. 1212; Commonwealth v. Lane, 113 Mass. 458, 18 Am. R. 509; State v. Brown, 47 Ohio St. 102, 23 N. E. R. 747, 21 Am. St. R. 790; 16 Am. & Eng. Ency. of Law, 2nd. Ed. 134.

[21] On this subject see part 3, title Divorce Laws and Procedure of Different States.

### §20. Marriage During Prohibited Period.

In states where the parties are forbidden by statute to marry again during the time for taking an appeal, it has been held that while the marriage ceremony celebrated during that period is a nullity, still, if, after the impediment is removed by the expiration of the time for appealing without an appeal having been taken, the parties continue cohabitation in good faith, agreeing to live and cohabit together as husband and wife, and actually sustain that relation to each other, they become lawfully wedded.[22] This rule, however, appears applicable only in those jurisdictions where, in the absence of any legal impediment, the only essential of a valid marriage is the free consent and agreement of the parties to live together in the marriage relation.

There seems to be a distinction drawn between statutes forbidding a second marriage during a specified period after a divorce or during the time for appeal or error and imposing a penalty therefor, and those which declare that the parties shall not be capable of contracting the second marriage but which do not impose a penalty. In the first instance the marriage is merely voidable, and in the second absolutely void.[23]

In Kansas, as well as in Nebraska, the statute apparently forbids the marriage but does not disqualify the parties, and, in accordance with the distinction just pointed out, it is there held that the second marriage is not void, but only voidable.[24] In Kentucky, under a statute declaring that the parties to a decree of divorce shall not be authorized to contract matrimony within two years, but not imposing a penalty for a second marriage within that time, it is held that the second marriage if contracted is void.[25]

In a number of the states of this country, common law marriages, or, as they are sometimes called, informal marriages, are recognized as valid, and even statutes requiring a marriage license are held to be directory merely and not mandatory. In

[22] Eaton v. Eaton, 66 Neb. 676, 92 N. W. R. 995, 1 Am. & Eng. Ann. Cas. 199.

[23] State v. Walker, 36 Kan. 297, 13 Pac. R. 279.

[24] Vonn v. Conn, 2 Kan. App. 419.

[25] Cox v. Combs, 8 B. Mon. (Ky.) 231.

such states the rule of law is, that in the absence of any legal impediment the only essential of a valid marriage is the free agreement and consent of the parties to live together in the marriage relation. But such agreement and consent must be executed by actual cohabitation, and not remain merely executory, before the marriage relation can be said to exist.[26]

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Georgia. Askew v. Dupree, 30 Ga. 173.
Kansas. State v. Walker, 36 Kan. 297, 13 Pac. R. 279.
Louisiana. Holmes v. Holmes, 6 La. 463.
Maine. Gardiner v. Manchester, 88 Me. 249, 33 Atl. R. 770.
Mississippi. Hargroves v. Thompson, 31 Miss. 211.
Nebraska. Hoggin v. Hoggin, 35 Neb. 375, 53 N. W. R. 209, 53 N. W. R. 209.
North Carolina. State v. Robbins, 6 Ird. L. (N. C.) 23; State v. Parker, 106 N. C. 711, 11 S. E. R. 517.
Tennessee. Johnson v. Johnson, 1 Coldw. (Tenn.) 626.
Vermont. Overseers of Poor v. Overseers of Poor, 2 Vt. 151.

It is also a well settled rule in many of the states that it will be presumed, concerning informal or common law marriages, that parties cohabiting as husband and wife, and acknowledging themselves to be such, are legally married.

Alabama. Ford v. Ford, 4 Ala. 142.
California. Matter of Rubino, 116 Cal. 304, 48 Pac. R. 127.
Connecticut. Budlington v. Munson, 33 Conn. 481.
Illinois. Miller v. White, 80 Ill. 580.
Indiana. Trimble v. Trimble, 2 Ind. 76.
Iowa. Barton v. Barton, 48 Iowa, 697.
Kansas. Shorten v. Judd, 60 Kan. 73, 55 Pac. R. 286.
Kentucky. Taylor v. Shanwell, 4 B. Mon. (Ky.) 575.
Louisiana. Bathrick v. Bathrick, 45 La. Ann. 1382.
Maine. Taylor v. Robinson, 29 Me. 323.
Massachusetts. Commonwealth v. Littlejohn, 15 Mass. 163.
Maryland. Jackson v. Jackson, 80 Md. 176, 30 Atl. R. 752.
Michigan. Hoffman v. Simpson, 110 Mich. 133, 67 N. W. R. 1107.
Mississippi. Spears v. Burton, 31 Miss. 547.
Missouri. Adair v. Mette, 156 Mo. 512, 575 S. W. R. 551.
Montana. Soyer v. Gt. Falls Water Co., 15 Mont. 1, 37 Pac. R. 838.
New Hampshire. Emerson v. Shaw, 56 N. H. 418.
New Jersey. Matter of Wallace, 49 N. J. Eq. 531, 25 Atl. R. 260.
New York. Bullock v. Bullock, 85 Hun (N. Y.) 373, 32 N. Y. S. 1009.
North Carolina. Weaver v. Cryer, 1 Dev. L. (N. C.) 337.
Ohio. Houpt v. Houpt, 5 Ohio 539.
Pennsylvania. Durning v. Hastings, 183 Pa. St. 210, 38 Atl. R. 627.
Rhode Island. Williams v. Herrick, 21 R. I. 401, 43 Atl. R. 1036.
Texas. Wright v. Wright, 6 Tex. 3.
Vermont. Northfield v. Vershire, 33 Vt. 110.
Virginia. Eldred v. Eldred, 97 Va. 606, 34 S. E. R. 477.
West Virginia. Hitchcock v. Hitchcock, 2 W. Va. 235.
Wisconsin. Thompson v. Nimms, 83 Wis. 261, 53 N. W. R. 502.

## §21. Protection of Injured Party and Offspring of Illegal Marriage.

While it is undoubtedly true that there is much conflict and confusion in the authorities on this subject, both sound reasoning and authority appear to sustain the position that disobedience of a provision in a decree of divorce prohibiting the offender, under a penalty, from marrying again during the life of the former spouse, will not make void a subsequent marriage in another state, between the one forbidden and one who was ignorant of such provision, but such marriage will be recognized for the protection of the innocent party and the children of such marriage.[27] In Vermont the statute provides that "when a marriage is dissolved * * * * * the parties shall be deemed single and may lawfully marry again. But it shall not be lawful for the petitionee (defendant) in divorce proceedings in which a divorce is granted * * * * * to marry another person than the petitioner for three years from the time such divorce is granted unless the petitioner dies within that time, in which case the petitionee (defendant) may marry again."[28] The Supreme Court of Vermont has held that a marriage entered into in violation of this statute may be annulled at the suit of the innocent party, although the statute does not expressly declare such remarriage to be void.[29] Much of the confusion and conflict in the authorities on this subject apparently arises from a failure to make the proper distinction between void marriages and those which the law holds to be only voidable. Another source of conflict may be said to be the inclination of some courts to construe the marriage contract by the same rules which govern contracts between individuals, where no relation exists between the parties other than that of promisor and promisee, while other courts, while recognizing marriage as based upon a contract between the parties, hold that the relation which exists and is created by the marriage contract is something more than that created by ordinary contracts. In all marital causes which the courts are called upon to adjudicate, it should be borne in mind that there are three parties in interest whose rights must be respected and protected,—the plaintiff, the defendant, and the public, and, in some cases, the interests of a fourth party, the offspring of the marriage, present a just claim for protection which the court is bound to recognize.

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[27] Crawford v. State, 35 L. R. A. (Miss.) 224; Parker v. Barron, 20 Ga. 702, 65 Am. Dec. 641; Mason v. Mason, 101 Ind. 25.

[28] Revised Laws of Vermont, 2391.

[29] Oviatt v. Smith, 68 Vt. 35 L. R. A. 223, 33 Atl. R. 769.

## §22. Modern Legislation.

While the statutes of many states declare marriage to be a civil contract, many of them recognize the relation existing between husband and wife as something above and beyond ordinary contract relations. In Michigan the legislature has declared marriage to be a civil contract, to which the free consent of the parties contracting is essential, but, recognizing the marriage relation as embracing interests above those arising from ordinary contracts, it provides remedies against branding an innocent woman a concubine or harlet, and her children as bastards, in those cases where she has been so unfortunate as to enter into a relation which she honestly supposed was lawful.[30] And even where the parties both enter into the marriage relation, knowing that it is unlawful for them to marry, and that their marriage by the statute is made void, the issue of such relation is treated as legitimate, except only where one or both of the parties had a former husband or wife living at the time the unlawful marriage was celebrated.[31]

## §23. Conflict of Divorce Laws.

The divorce laws of the several states present a great variety of conflicting provisions. Proceedings which result in a valid divorce in one state or country may be absolutely void in many cases if had in another state or country.

In this country the establishment of divorce laws and courts, as well as methods of procedure, is under the absolute control of each state, and every state in the Union, except South Carolina, has established courts, methods of procedure and grounds for divorce which are essentially different in each state. The Congress of the United States has no power to enact divorce laws in any of the states, but it has absolute power over divorce laws in the District of Columbia, the Philippines, Guam and Alaska, which have no legislative bodies, and it has enacted such laws for Alaska and the District of

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[30] C. L. '15, (11394); Howell (2nd), 11455.

[31] C. L. '15, (11392); Howell (2nd) §11453; In re Fitzgibbons' Est. 162 Mich. 416-421, 127 N. W. R. 313.

Columbia. The Congress has also supervisory power over divorce laws which may be enacted by the territorial legislatures of Porto Rico and Hawaii.

## §24. Full Faith and Credit Clause of the Federal Constitution.

The conflicting divorce laws of the several states and the different methods of procedure adopted make necessary some uniform rule by which the validity of divorce judgments may be determined. This uniformity is secured by the federal constitution, which provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."[32] Under this provision the courts of each state are bound to give full faith and credit to all valid judgments and decrees of the courts of every other state of the Union, but this requirement does not extend to the giving of validity to those proceedings which in themselves are mere nullities. It is fundamental in judicial proceedings that the court assuming to act and to render judgments must have competent authority to do so in the particular case, and when this authority is wanting, whatever is done is not judicial and cannot be protected by the Federal constitution.[33] And if the record, by its recitals, makes a *prima facie* case of jurisdiction, no one in another state or country is concluded thereby, but it may be shown what the real fact was, and thus disprove the authority for making such record.[34]

## §25. Effect Same as in State where Judgment is Rendered.

A judgment or decree of a court of one state, when sued upon, introduced in evidence, or pleaded in another state, is entitled to receive the same faith and credit that is accorded to it in the state where rendered, so that if valid and conclusive in that state, it is valid and conclusive in all other states.[35] But a judgment from another state is entitled to no greater effect or finality than would be accorded to it in the state where it was rendered, and therefore, if it would there be inconclusive, impeachable, or reviewable, it will be awarded no greater consideration or measure of finality in other states.[36] The validity and effect of any judgment or judicial decree, therefore, must be determined by referring to the laws of the state where it was rendered, and for this purpose it is held in some of the states that the courts of one state will take judicial notice of

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[32] Constitution of the United States, Art. IV. Sec. 1.

[33] Reed v. Reed, 52 Mich. 117, 17 N. W. R. 720.

[34] Thompson v. Whitman, 18 Wall (U. S.) 457, 21 L. Ed. 897; Knowles v. Gas Light Co. 19 Wall. (U. S.) 58, 22 L. Ed. 70; Barrett v. Knight, 1 Mass. 401, 2 Am. Dec. 36; Shumway v. Stillman, 4 Cow. 292, 15 Am. Dec. 374; Thompson v. Emmert, 15, Ill. 416; Marx v. Force, 51 Mo. 69, 11 Am. R. 200; Reel v. Elder, 62 Pa. St. 308, 1 Am. R. 414; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. R. 340; Gilman v. Gilman, 126 Mass. 26, 30 Am. R. 646; Bowen v. Huston, 30 Grat. 266, 32 Am. R. 673; Eaton v. Hasty, 6 Neb. 419, 29 Am. R. 365.

[35] These cases arranged as to jurisdiction:

Connecticut. Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683.
Georgia. Tompkins v. Cooper, 97 Ga. 633, 25 S. E. R. 247.
Illinois. McFulton v. Long, 13 Ill. 486, 54 Am. Dec. 449; Kimmel v. Schultz, 1 Ill. 169; Newman v. Greely St. Bank, 92 Ill. App. 638.
Indiana. Davis v. Lane, 2 Ind. 548, 54 Am. Dec. 458.
Iowa. Miller Brewing Co. v. Capital Ins. Co., 111 Iowa 590, 82 N. W. R. 1023, 82 Am. St. R. 529.
Kansas. R. R. Co. v. Campbelle, 5 Kan. App. 423, 49 Pac. R. 321.
Kentucky. Galloway v. Glenn, 105 Ky. 648, 49 S. W. R. 440, 20 Ky. L. R. 1447; Fletcher v. Ferris, 9 Dana 372, 35 Am. Dec. 143.
Maine. Lambertson v. Grant, 94 Me. 508, 48 Atl. R. 127.
Maryland. U. S. Bank v. Merchants Bank, 7 Gill 415; Brengal v. McClellan, 7 Gill & J. 434.
Massachusetts. Vanorman v. Gordon, 172 Mass. 576, 53 N. E. R. 267, 70 Am. St. R. 309, 44 L. R. A. 840.
Missouri. Tootie v. Buckingham, 190 Mo. 183, 88 S. W. R. 610; Hudson v. Kimberley Pub. Co. v. Young, 90 Mo. App. 61.
New Jersey. Gulick v. Loder, 13 N. J. L. 68, 23 Am. Dec. 711; Gibbons v. Livingston, 6 N. J. L. 236; Orient Ins. Co. v. Rudolph, 61 Atl. R. 26.
New York. Blacks Case, 4 Abb. Prac. R. 162; Green v. VanBuskirk, How. Prac. R. 52.
Ohio. Arndt v. Arndt, 15 Ohio 33; Pelton v. Pelton, 13 Ohio 209, 42 Am. Dec. 197.
Pennsylvania. Levison v. Blumenthall, 25 Phila. Supr. Ct. R. 55; Curran v. Rowley, 2 Pa. Co. Ct. R. 539; R. R. Co. v. Mercer, 11 Phila. 226.
Virginia. Piedemont & Co. Life Ins. Co. v. Ray, 75 Va. 821; Buford v. Buford, 4 Munf. 241, 6 Am. Dec. 511.
Washington. Clark v. Ettinge, 38 Wash. 376, 80 Pac. R. 556.
West Virginia. Wells-Stone Mercantile Co. v. Truax, 44 W. Va. 538, 29 S. E. R. 1006.
Wisconsin. Parker v. Stoughton Mill Co. 91 Wis. 174, 64 N. W. R. 751, 51 Am. St. R. 881.
United States. Harris v. Balk, 192 U. S. 215, 25 Sup. Ct. R. 625, 49 L. Ed. 1023; Christina v. Russell, 5 Wall. 292, 18 L. Ed. 475; Mills v. Durye, 7 Cranch, 481, 3 L. Ed. 411.

[36] These cases arranged as to jurisdiction:

Alabama. Peet v. Hatcher, 112 Ala. 514, 21 So. R. 711, 57 Am. St. R. 45.

the laws of another state.[37] But this doctrine is not generally adopted, and it appears to be directly in conflict with the decisions of the Supreme Court of the United States and those of the courts of last resort of most of the states. The better and more consistent rule seems to be that the laws of a foreign state must be proved as facts, and if there is no evidence of the laws of the state where the judgment was rendered, the court where it is sought to be enforced will presume that those laws are the same as the laws of its own state, and will give effect to the judgment accordingly.[38]

While, as we have seen, some of the state courts have held that in order to give effect to the full faith and credit clause, they will take judicial notice of the laws of other states, this view has been emphatically repudiated by the Supreme Court

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Arkansas. Barkman v. Hopkins, 11 Ark. 157.
Connecticut. Wood v. Watkinson, 17 Conn. 500, 44 Am. Dec. 652.
Illinois. Newman v. Greely St. Bank, 92 Ill. App. 638.
Louisiana. Ahlefeldt, 105 La. 543, 30 So. R. 175; Bank of Commerce v. Mayer, 42 La. Ann. 1031, 8 So. R. 260; McLaren v. Kehler, 23 La. Ann. 80, 8 Am. R. 592; Tipton v. Mayfield, 10 La. 189.
Maryland. Wernwag v. Pawling, 4 Gill & J. 500, 25 Am. Dec. 317.
Nebraska. Gaster v. Currie, 94 N. W. R. 995.
Pennsylvania. Bowersox v. Gitt, 12 Pa. Co. Ct. 81.
Texas. Babcock v. Marshall, 21 Tex. Civ. App. 145, 50 S. W. R. 728.
Wisconsin. Brown v. Parker, 28 Wis. 21.
United States. Danville First National Bank v. Cunningham, 48 Fed. R. 510.

[37] Peet v. Hutchins, 112 Ala. 514, 21 So. R. 711, 57 Am. St. R. 45; Rae v. Hulbert, 17 Ill. 572; Hull v. Webb, 78 Ill. App. 617; Butcher v. Bank, 2 Kan. 70, 83 Am. Dec. 446; Ohio v. Hinchman, 27 Pa. St. 479; Paine v. Ins. Co. 11 R. I. 411; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. R. 125, 54 L. R. A. 204.

[38] The cases arranged as to jurisdiction:
United States. Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. R. 242, 29 L. Ed. 535; Chicago &c. R. R. Co. v. Wiggins Ferry Co., 119 U. S. 615, 7 Sup. Ct. R. 398, 30 L. Ed. 519.
Florida. Lammis v. Wightman, 31 Fla. 10, 12 So. R. 526.
Illinois. Baltimore &c. R. R. Co. v. McDonald, 112 Ill. App. 391.
Louisiana. Bank of Commerce v. Mayer, 42 La. Ann. 1031, 8 So. R. 260.
New Jersey. Thompson v. Williamson, 58 Atl. R. 602; Davis v. Headly, 22 N. J. Eq. 115.
New York. People v. Dewey, 50 N. Y. Sup. 1013.
Ohio. Pelton v. Platner, 13 Ohio 209, 42 Am. Dec. 197.
South Dakota. Thomas v. Pendleton, 1 S. D. 150, 46 N. W. R. 180, 36 Am. St. R. 726.
Wisconsin. Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269.

of the United States and the courts of last resort of many of the states.[39]

### §26. Written Laws of Foreign Countries.—How Proven.

When the validity of a divorce judgment or decree granted in a foreign country comes in question it usually becomes necessary to ascertain what the statute law of that country is. This can be done only by proof of the statute law of such country as a fact. The method of proving such fact is determined by the course pointed out by the laws of the jurisdiction where the question is raised.

In the State of Michigan, printed copies of the statute laws and resolves of any other of the United States, or of any territory thereof, or of any foreign state, if purporting to be published under the authority of the respective governments, or if commonly admitted and used as evidence in their courts, shall be admitted in all courts and in all proceedings within the state as *prima facie* evidence of such laws and resolves.[40] The courts of Michigan do not take judicial notice of the laws of other states or of foreign countries.[41] Printed copies of the laws of foreign countries are *prima facie* evidence only, and will be treated as authentic until the contrary is shown.[42] Such laws may be proven by exemplifications under the great seal of the state or foreign country,[43] but not by parol, without showing why such evidence is necessary.[44]

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United States. Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. R. 242, 29 L. Ed. 535.

Florida. Sammia v. Wightman, 31 Fla. 10, 12 So. R. 520.

Iowa. Taylor v. Runyan, 9 Iowa 522.

Massachusetts. Knapp v. Abel, 10 Allen 485; Wright v. Andrews, 130 Mass. 149; Mowry v. Chase, 100 Mass. 79.

Texas. Gill v. Everman, 94 Tex. 209, 59 S. W. R. 531; Porchler v. Bronson, 50 Tex. 555.

Wisconsin. Osborn v. Blackburn, 78 Wis. 209, 47 N. W. R. 175, 23 Am. St. R. 460, 10 L. R. A. 367; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269. See also, Walsh v. Dart, 12 Wis. 635; Hull v. Augustine, 23 Wis. 383; Pierce v. Chicago & N. W. R. R. Co., 36 Wis. 283; Horn v. Chicago & N. W. R. R. Co., 38 Wis. 463; Kellam v. Toms, 38 Wis. 592, all of which follow the doctrine laid down in Rape v. Heaton. The Supreme Court of the United States recognizes the same rule in the following cases: Lloyd v. Matthews, 155 U. S. 222, 15 Sup. Ct. R. 70, 39 L. Ed. 128; Chicago &c. R. R. Co., v. Wiggins Ferry Co., 119 U. S. 615, 7 Sup. Ct. R. 398, 30 L. Ed. 519.

[40] C. L. '15, (12513); Howell (2nd.) §12818.

[41] Worthington v. Hanna, 23 Mich. 534; Great Western Ry. Co., v. Miller, 19 Mich. 305-314; People v. Lambert, 5 Mich. 349; Kermott v. Ayer, 11 Mich. 183-4; Ellis v. Maxon 19 Mich. 186; Jones v. Palmer, 1 Doug. 379.

The laws of another state or country, as shown by its statutes, are presumed to continue unchanged until the contrary is shown.[45] A compilation of the statutes of another state commonly admitted in the courts and proceedings in that state as *prima facie* evidence of its laws, may be used to prove such laws, though it is an unofficial publication.[46] It appears to be a well settled rule, both in this country and in England, that the courts will not take judicial cognizance of the written laws of a foreign country.[47]

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[42] People v. Calder, 30 Mich 88; Wilt v. Cutler, 38 Mich. 189; Rice v. Rankans, 101 Mich. 378, 59 N. W. R. 660.

[43] People v. Calder, 30 Mich. 85.

[44] People v. Lambert, 5 Mich. 349.

[45] People v. Calder, 30 Mich. 88.

[46] People v. McQuaid, 85 Mich. 123, 48 N. W. R. 161.

[47] The following cases arranged as to jurisdiction:

Alabama. Doe v. Eslava, 11 Ala. 1028.

Arkansas. Cox v. Morrow, 14 Ark. 603.

California. Wickersham v. Johnston, 104 Cal. 407, 38 Pac. R. 89, 43 Am. St. R. 118.

Connecticut. Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179.

Delaware. Thomas v. Grand Trunk Ry. Co., 1 Pennew. 593, 42 Atl. R. 987.

Illinois. McCurdy v. Alaska &c. Commercial Co., 102 Ill. App. 120; Dempster v. Stephen, 63 Ill. App. 126; Rand v. Continental Mut. F. Ins. Co., 58 Ill. App. 665.

Indiana. Coplinger v. The David Gibson, 14 Ind. 480.

Iowa. Banco de Sonoro v. Bankers Mut. Casualty Co., 95 N. W. R. 232; Bean v. Briggs, 4 Iowa, 464.

Louisiana. Kohn v. The Renaissance, 5 La. Ann. 25, 52 Am. Dec. 527.

Maryland. Baptiste v. De Wolunbrun, 5 Har. & J. 86.

Massachusetts. Aslanian v. Dostumian, 174 Mass. 328, 54 N. E. R. 845, 75 Am. St. R. 348, 47 L. R. A. 495; Eastman v. Crosby, 8 Allen 206; Palfrey v. Portland &c. Ry. Co., 4 Allen 55.

Michigan. Chapman v. Colby, 47 Mich. 46, 10 N. W. R. 74; Kermott v. Ayer, 11 Mich. 181; 1 Greenleaf Evidence, 15th. Ed. Sec. 486-8.

Minnesota. Brimhall v. Van Campen, 8 Minn. 13, 82 Am. Dec. 118.

Mississippi. Sessions v. Doe, 7 Sm. & M. 130.

Missouri. Charlotte v. Chouteau, 25 Mo. 465; Chouteau v. Pierre, 9 Mo. 3.

Nebraska. Moses v. Comstock, 4 Neb. 516.

New Jersey. Campion v. Kille, 14 N. J. Eq. 229, 15 N. J. Eq. 476.

New York. Monroe v. Douglass, 5 N. Y. 447; Munroe v. Guilleaume, 3 Abb. Dec. 334; Bates v. Virolette, 33 N. Y. App. Div.

436, 53 N. Y. Sup. 893; Ocean Ins. Co. v. Francis, 2 Wend. 64, 19 Am. Dec. 549; Thompson v. Ketcham, 4 Johns. 285; Hosford v. Nichols, 1 Paige 220.

Oregon. State v. Moy Look, 7 Ore. 54.

South Carolina. McFee v. South Carolina Ins. Co., 2 McCord 503, 13 Am. Dec. 757.

Texas. Trigg v. Moore, 10 Tex. 197; Bryant v. Kelton, 1 Tex. 434; Crosby v. Huston, 1 Tex. 203; Burton v. Anderson, 1 Tex. 93.

Vermont. McLeod v. Connecticut &c. Ry. Co., 58 Vt. 727, 6 Atl. R. 648; Woodrow v. O'Connor, 28 Vt. 776; Peck v. Hibbard, 26 Vt. 698, 62 Am. Dec. 605.

United States. Coghland v. S. C. Ry. Co., 142 U. S. 101, 12 Sup. Ct. 150, 35 L. Ed. 951; Liverpool &c. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. R. 469, 32 L. Ed. 788; Dainesse v. Hale, 91 U. S. 13, 23 L. Ed. 190; Ennis v. Smith, 14 How. 400, 14 L. Ed. 472; Strother v. Lucas, 6 Pet. 763, 8 L. Ed. 573; Church v. Hubbart, 2 Cranch 187, 2 L. Ed. 249; U. S. v. Ortega, 4 Wash. 531; Wilcocks v. Phillips, 1 Wal. Jr. 47; Pierce v. Indseth, 106 U. S. 546, 27 L. Ed. 254.

England. DeBodes Case 8 Q. B. 208; Nelso v. Bridport, 8 Beav. 527, 10 Jur. 871; Millar v. Henrick, 4 Campb. 155; Giles v. Hill, 1 Campb. 471; Fyson v. Kemp, 6 C. & P. 71, 25 E. C. L. 326; Lacon v. Higgins, 3 Stark. 178; McNeil v. Perchard, 1 Esp. 263; Lloyd v. Guibert, L. R. 1 Q. B. 115. In Lloyd v. Guibert, Mr. Justice Willes in delivering judgment said: "In order to preclude all misapprehension, it may be well to add, that a party who relies upon a right or an exemption by a foreign law is bound to bring such law properly before the court, and to establish it in proof. Otherwise the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England."

Canada. Giles v. Garlepy, 29 L. C. Jur. 207.

# CHAPTER III.

# VALIDITY OF FOREIGN DIVORCE AS DEPENDENT UPON JURISDICTION OVER DEFENDANT.

§27. Scope of Subject Discussed.
§28. Domicile of Both Parties in State of Forum.
§29. Domicile of Neither Party in State of Forum.
§30. Domicile of One Party in State of Forum.—Personal Service on Other Party.
§31. Same.—Constructive or Substituted Service on Other Party.
§32. Effect on Property Rights when Decree Granted on Constructive Service.
§33. Right to Alimony.
§34. Custody of Minor Children.—Remarriage of Defendant.
§35. Limited Recognition.—Interstate Comity.
§36. Nonrecognition where no Personal Service is Had.
§37. Same.—Pennsylvania Rule.
§38. Same.—South Carolina Rule.
§39. Rule in Federal Courts.—Atherton v. Atherton and Haddock v. Haddock.

## §27. Scope of Subject Discussed.

Continuing the subject of the conflict of laws on the subject of marriage and divorce, the purpose of this chapter is to discuss the question of the validity of a divorce granted by a foreign court, so far as its validity depends upon the jurisdiction which the court granting the decree acquired over the defendant, when such jurisdiction was exercised in the manner provided by the law of the state in which the decree was granted. In other words, the important question in this connection is whether a court of competent jurisdiction, in which an action for divorce is instituted, having acquired jurisdiction over the defendant in the manner prescribed by the local law, has acquired such jurisdiction as entitles its decree of divorce to extra-territorial recognition, assuming that the court has jurisdiction of the subject-matter of the divorce, that it has jurisdiction to grant a divorce at the suit of the plaintiff, that the divorce is granted for reasons entitling it to recognition extraterritorially, and that the proceedings are regular.

No difficulty or serious difference of opinion can arise as to some phases of this question. Thus, it is nowhere questioned that a foreign divorce is valid and entitled to extra-territorial recognition if both of the parties were domiciled within the territorial jurisdiction of the court granting the decree, whether the service on the defendant was actual or constructive. Nor has it ever been questioned that a foreign divorce is valid if granted against a non-resident defendant who was personally served with process within the territorial jurisdiction of the court, or who entered an appearance in the action either in person or by attorney. It is eqally well settled that a foreign divorce, based upon a constructive service, is invalid if neither of the parties were domiciled within the territorial jurisdiction of the court which granted the decree.

The difficulty arises in those cases where the divorce is granted in favor of a plaintiff domiciled within the territorial jurisdiction of the court, and against a defendant domiciled in another jurisdiction. This latter question has given rise to such a decided difference of opinion that the authorities seem to be in hopeless and unreconcilable conflict.

### §28. Domicile of Both Parties in State of Forum.

Where both parties have their domicile in the same state a decree of divorce granted by a court of competent jurisdiction in that state, founded upon personal service, is valid and entitled to recognition in every other state.[1]

In the state of New York it is held that a decree of divorce granted by the courts of another state in favor of a citizen there domiciled, and against a domiciled citizen of the same state, founded upon substituted service of process made in the manner authorized by the law of that state in the case of absent defendants, is valid *in personam* so as to effect a dissolution of the marriage contract, and is conclusive upon the defendant in the courts of another state, though, during the proceedings, he was not in the territorial jurisdiction of the court which granted the decree, and did not enter an appearance in the case.[2] This is upon the principle that the court which granted the decree had jurisdiction of both the subject matter and the parties to the suit, and the decree therefore is a judgment entitled under the Federal constitution to full faith and credit in every other state.[3] Such divorce is not only a bar to an action subsequently brought by the defendant in another state, but a subsequent marriage by the plaintiff is valid, not only in the state where the divorce was granted, but in every other state.[4] In Atherton v. Atherton, 155 N. Y. 129, 49 N. E. R. 933, where a divorce was granted in Kentucky to a husband whose wife had abandoned him and removed to the state of New York, the court refused to recognize its validity for the reason that only constructive service had been made upon the wife, and a divorce was granted to her upon her petition, but on appeal to the Supreme Court of the United States, the decree was reversed, that court holding that the decree of the Kentucky court was entitled to full faith and credit in the state of New York.[5]

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[1] Barber v. Root, 10 Mass. 260.

[2] Hunt v. Hunt, 72 N. Y. 217; Matter of Dennick, 92 Hun (N. Y.) 161, 36 N. Y. Supp. 518; Lacey v. Lacey, 77 N. Y. Supp. 235; Campbelle v. Campbelle, 90 Hun (N. Y.) 233, 35 N. Y. Supp. 280; Matter of Morricon, 52 Hun (N. Y.) 102, 5 N. Y. Supp. 90.

## §29. Domicile of Neither Party in State of Forum.

A decree of divorce upon constructive service alone, granted by the court of a state in which neither party is domiciled and where there is no appearance of the defendant, either in person or by attorney, will not be recognized in other states.[6] This is also true of a divorce granted in a foreign country,[7] and such a divorce cannot be set up as a bar to an action for divorce brought by the original defendant in the state where the parties are domiciled.[8] Nor does the decree bar an action for divorce brought by the original defendant and based upon the ground that the original plaintiff committed adultery by remarrying, and if after such a divorce the original defendant should remarry, the decree would be no defense to a prosecution for open and notorious fornication, or lewd and lascivious cohabitation.[9] A decree of divorce rendered under such circumstances is not entitled to recognition in other states under the Federal constitution.[10]

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[3] Hunt v. Hunt, 72 N. Y. 217.

[4] Matter of Dennick, 92 Hun (N. Y.) 161, 36 N. Y. Supp. 518.

[5] Atherton v. Atherton, 181 U. S. 155, 45 L. Ed. 794, 21 Sup. Ct. 544.

[6] Leith v. Leith, 39 N. H. 20; People v. Dawell, 25 Mich. 247; Sewall v. Sewall, 122 Mass. 150, 23 Am. R. 299; Litowitch v. Litowitch, 19 Kan. 451, 27 Am. R. 145; Van Fossen v. State, 37 Ohio St. 317, 41 Am. R. 507; Gregory v. Gregory, 78 Me. 187, 57 Am. R. 792; Dunham v. Dunham, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841; Thelen v. Thelen, 75 Minn. 433, 78 N. W. R. 108; Magowan v. Magowan, 57 N. J. Eq. 322, 42 Atl. 330; Streitwolf v. Streitwolf, 181 U. S. 179, 45 L. Ed. 807, 21 Sup. Ct. 553; Bell v. Bell, 181 U. S. 175, 45 L. Ed. 804, 21 Sup. Ct. R. 551; Wright v. Wright, 24 Mich. 180; Smith v. Smith, 19 Neb. 706, 28 N. W. R. 296; Prosser v. Warnes, 47 Vt. 667.

[7] De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 946; St. Sure v. Lindsfelt, 82 Wis. 346, 52 N. W. 308.

[8] Bell v. Bell, 181 U. S. 175, 45 L. Ed. 804, 21 Sup. Ct. R. 551;

### §30. Domicile of One Party in State of Forum—Personal Service on Other Party.

Where an action for divorce against a non-resident is instituted in a state court of competent jurisdiction, personal service on the defendant gives the court jurisdiction over his person, empowering it to grant a divorce which will be valid, not only in that state, but in every other state of the Union,[11] and in such case the decree will be valid, though there may have been no personal service of process, if the defendant enters an appearance in the case, either in person or by attorney.[12]

Although a divorce, by reason of service by publication only, may be ineffectual as to a non-resident defendant, he will be bound by a supplementary decree on motion of the plaintiff, rendered against him for alimony already accrued under the original decree if he has appeared and contested the motion.[13]

A decree of divorce, rendered by a state court of competent jurisdiction against a non-resident defendant upon whom no service has been had but who has appeared in the case, will be entitled to protection and must receive recognition in every other state under the full faith and credit clause of the Federal constitution. But where there is a statute in the state of the hubsand's domicile providing that where a decree of divorce is granted a wife for the wrong of the husband she shall

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Strait v. Strait, 3 McArthur, (D. C.) 415; Hoffman v. Hoffman, 46 N. Y. 30; Smith v. Smith, 19 Neb. 706, 28 N. W. R. 296.

[9] Hood v. State, 56 Ind. 263.

[10] Hood v. State, 56 Ind. 263; Wright v. Wright, 24 Mich. 180; Van Inwagen v. Van Inwagen, 86 Mich. 339, 49 N. W. R. 50; Bear v. Heasley, 98 Mich. 315; 57 N. W. R. 270; People v. Dawell, 25 Mich. 247; McEwan v. Zimmer, 38 Mich. 765.

[11] McGill v. Deeming, 44 Ohio St. 645, 11 N. E. R. 118.

[12] Cheever v. Wilson, 9 Wall. (U. S.) 108, 19 L. Ed. 604; Jones v. Jones, 108 N. Y. 415, 15 N. E. R. 707; Rigney v. Rigney, 127 N. Y. 408, 24 N. E. R. 405; Rich v. Rich, 88 Hun (N. Y.) 566, 34 N. Y. Supp. 845; Arrington v. Arrington, 102 N. C. 491, 9 S. E. R. 200; Bidwell v. Bidwell, 139 N. C. 402, 52 S. E. R. 55.

[13] Lynde v. Lynde, 162 N. Y. 405, 56 N. E. R. 979.

be entitled to dower, an absolute divorce granted the wife on that ground in another state, founded upon personal service upon the husband, entitles her to dower in his real property located in the state of his domicile, and this though she marries another man after the divorce and before her first husband's death.[14]

## §31. Same.—Constructive or Substituted Service on Other Party.

There seems to be a hopeless and irreconcilable conflict of authority in this country on the subject of the validity of a divorce granted a resident against a non-resident, where only constructive or substituted service has been made.[14a] In a number of states the rule seems to be that where the statutes of a state provide that a divorce may be granted in that state in proceedings instituted by constructive service, a divorce so granted to a plaintiff who has a *bona fide* domicile therein, against a non-resident defendant, if valid there is equally valid in every other state, so far as the dissolution of the marriage relation is concerned, notwithstanding the fact that the defendant was not served with process personally and had no knowledge of the proceedings.[15] And this appears to be the rule though the state in which the divorce is granted is not the state in which the marriage was celebrated.[16] This rule has been applied to a husband who removed in good faith from the state where the marriage was celebrated to the state where the decree was granted, for the *bona fide* purpose of residing there,[17] and to a divorce obtained by a wife who separated from her husband for adequate cause, and removed in good faith from the state where her husband resided to the state where the divorce was granted, with the intention of making that state her permanent residence.[18]

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[14] McGill v. Deming, 44 Ohio St. 645, 11 N. E. R. 118.

[14a] The cases on both sides of this question are very numerous. The question is exhaustively discussed in the cases of Atherton v. Atherton, 181 U. S. 155, 45 L. Ed. 794, 21 Sup. Ct. R. 544, and in Haddock v. Haddock, 201 U. S. 561, 50 L. Ed. 867, and many of the leading authorities on both sides of the question are cited.

[15] The following cases arranged as to jurisdiction:

Alabama. Thompson v. State, *Ala.* 12; Thompson v. Thompson, 91 Ala. 591, 8 So. R. 419.

California. Matter of Newman, 75 Cal. 213, 16 Pac. R. 887; Matter of James, 99 Cal. 374, 33 Pac. R. 1122.

Illinois. Knowlton v. Knowlton, 155 Ill. 158, 39 N. E. R. 595; Dunham v. Dunham, 162 Ill. 589, 44 N. E. R. 841.

Indiana. Hilbish v. Hattle, 145 Ind. 59, 44 N. E. R. 20.

Iowa. Wakefield v. Ives, 35 Iowa 238; Van Orsdall v. Van Orsdall, 67 Iowa 35, 24 N. E. R. 579.

Kansas. Chapman v. Chapman, 48 Kan. 636, 29 Pac. R. 1071; Rodgers v. Rodgers, 56 Kan. 483, 43 Pac. R. 779; Roe v. Roe, 52 Kan. 724, 35 Pac. R. 808.

Kentucky. Hawkins v. Ragsdale, 80 Ky. 353.

Louisiana. Benton's Succession, 106 La. 494, 31 So. R. 123; Smith v. Smith, 43 La. Ann. 1140, 10 So. R. 248.

Maine. Handing v. Alden, 9 Me. 140.

Maryland. Garner v. Garner, 56 Md. 127.

Minnesota. Thurston v. Thurston, 58 Minn. 279, 59 N. W. R. 1017.

The true principle upon which divorces are sustained, which are granted in other jurisdictions against non-resident defendants constructively served, appears to be that a proceeding to dissolve the marriage relation is a proceeding *in rem*, the marriage status being the *res*.[19]

## §32. Effect on Property Rights when Decree Granted on Constructive Service.

Those cases which sustain divorces granted against non-resident defendants constructively served, and holding that such divorces operate to dissolve the marriage relation, not only in the state where granted but in every other state, are not entirely harmonious as to the extra-territorial effect of the decree upon the property rights of the parties. Some of the cases hold that while a decree of divorce rendered against a

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Missouri. Gould v. Crow, 57 Mo. 200; Anthony v. Rice, 110 Mo. 223, 19 S. W. R. 423.

Ohio. Doerr v. Forsythe, 50 Ohio St. 726, 35 N. E. R. 1055.

Rhode Island. Ditson v. Ditson, 4 R. I. 87.

Tennessee. Thoms v. King, 95 Tenn. 60, 31 S. W. R. 983.

Wisconsin. Shafer v. Byshnell, 24 Wis. 372; Cook v. Cook, 56 Wis. 195, 14 N. W. R. 33, 443,

[16] Thompson v. Thompson, 91 Ala. 591, 8 So. R. 419; Matter of James, 99 Cal. 374, 33 Pac. R. 1122; Knowlton v. Knowlton, 155 Ill. 158, 39 N. E. R. 595; Van Orsdall v. Van Orsdall, 67 Iowa 35, 24 N. W. R. 579; Roe v. Roe, 52 Kan. 724, 35 Pac. R. 808; Harding v. Alden, 9 Me. 140; Gould v. Crow, 57 Mo. 200; Doerr v. Forsythe, 50 Ohio St. 726, 35 N. E. R. 1055; Ditson v. Ditson, 4 58 Minn. 279, 59 N. W. R. 1017. R. I. 87; Thomas v. King, 95 Tenn. 60, 31 S. W. R. 983.

[17] Thompson v. Thompson, 91 Ala. 591, 8 So. R. 419; Van Orsdall v. Van Orsdall, 67 Iowa 35, 24 N. W. R. 579; Roe v. Roe, 52 Kan. 724, 35 Pac. R. 808; Gould v. Crow, 57 Mo. 200; Doerr v. Forsythe, 50 Ohio St. 726, 35 N. E. R. 1055.

[18] Dunham v. Dunham, 162 Ill. 589, 44 N. E. R. 841; Chapman v. Chapman, 48 Kan. 636, 29 Pac. R. 1071.

[19] Matter of Newman, 75 Cal. 213, 16 Pac. R. 887; Dunham v. Dunham, 162 Ill. 589, 44 N. E. R.

non-resident defendant, founded upon service by publication only, determines the status of the parties, it does not by its own force affect the right to property in other states.[20] Thus a divorce based upon constructive service procured by a husband in one state does not cut off his wife's dower right in property located in another state which is the state of her residence.[21]

On the other hand it has been held that such a decree of divorce not only dissolves the marriage, but cuts off the wife's dower right or the husband's curtesy, as the case may be, even as to land located in other states.[22]

## §33. Right to Alimony.

As to the extra-territorial effect upon the right to alimony of a divorce granted upon constructive service, the decided cases are more harmonious. The proceeding not being *in personam,* such a divorce when rendered against the wife does not preclude her from recovering alimony in an appropriate proceeding instituted by her in the state of her residence.[23] And on the same principle a decree of divorce based upon constructive service, which undertakes to award alimony, has no extra-territorial effect as to alimony,[24] and a wife who has obtained a decree of divorce and alimony in a proceeding in a state other than that of her husband's domicile, in which only constructive service was had, may maintain an independent action against her husband for alimony in the state of his residence.[25]

## §34. Custody of Minor Children—Remarriage of Defendant.

A decree of divorce based only upon constructive service has no extra-territorial effect so far as it attempts to fix and determine the custody and control of the minor children of

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841; Gould v. Crow, 57 Mo. 200; Thomas v. King, 95 Tenn. 60, 31 S. W. R. 983; Ellison v. Martin, 53 Mo. 575.

[20] Hawkins v. Ragsdale, 80 Ky. 353; Thurston v. Thurston,

[21] Doerr v. Forsythe, 50 Ohio St. 726, 35 N. E. R. 1055.

[22] Hiblish v. Hattle, 145 Ind. 59, 44 N. E. R. 20; Gould v. Crow, 57 Mo. 200; Thomas v. King, 95 Tenn. 60, 31 S. W. R. 983.

[23] Rogers v. Rogers, 56 Kan. 483, 43 Pac. R. 779; Thurston v. Thurston, 58 Minn. 270, 59 N. W. R. 1017.

[24] Gould v. Crow, 57 Mo. 200; Eldred v. Eldred, 62 Neb. 613, 87 N. W. R. 340.

[25] Eldred v. Eldred, 62 Neb. 613, 87 N. W. R. 340; Cox v. Cox, 19 Ohio St. 502.

the parties,[26] and it has been held that such a decree has no extra-territorial effect so far as it prohibits the defendant from marrying again.[27]

### §35. Limited Recognition—Interstate Comity.

In the state of New Jersey it has been held that interstate comity requires the courts of that state to recognize a decree of divorce pronounced by a court of the state in which the plaintiff is domiciled and which has jurisdiction of the subject-matter of the suit, in the absence of fraud, notwithstanding the fact that the defendant does not reside within the jurisdiction of the court which granted the decree and has not been served with process therein, provided that a substituted service was made in accordance with the provisions of the statutes of that state, and that actual notice of the pendency of the suit has been given to the defendant, together with a reasonable opportunity to put in a defense thereto, and provided further, that the ground on which the decree rests is one which the public policy of the state in which it is sought to be enforced recognizes as a sufficient ground for divorce.[28]

But a foreign decree of divorce will not be recognized in New Jersey if the defendant was not served with process or notice, and had no knowledge of the proceedings until after their termination, whatever its effect may be in the foreign state, and such a divorce will be no bar to a suit for divorce, subsequently brought by the defendant in New Jersey.[29] This appears to be upon the theory that an appeal to interstate comity to recognize a foreign decree ought not to prevail when the judgment has been rendered in violation of the fundamental maxim of justice that every person shall have an opportunity to be heard before his rights are passed upon by a judicial tribunal.[30]

In Louisiana it has been held that the courts of that state will, by comity, hold valid a divorce granted upon constructive service of process, against a resident of that state by the courts of a foreign state, provided the policy of the divorce legislation of the two states is similar and the notice given in the foreign state is in substantial accord with the Louisiana statute.[31]

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[26] Kline v. Kline, 57 Iowa 386, 10 N. W. R. 825; Rodgers v. Rodgers, 56 Kan. 483, 43 Pac. R. 779.

[27] Garner v. Garner, 56 Md. 127.

[28] Felt v. Felt, 59 N. J. Eq. 606, 45 Atl. R. 105, 49 Atl. R. 1017.

[29] Flower v. Flower. 42 N. J. Eq. 152, 7 Atl. R. 669; Fairchild v. Fairchild, 53 N. J. Eq. 678, 34 Atl. R. 10.

[30] Doughty v. Doughty, 28 N. J. Eq. 581.

## §36. Nonrecognition where no Personal Service is Had.

In a number of cases the Federal courts, and some of the state courts, have taken the position that a divorce founded upon constructive service, rendered in one state against a non-resident defendant without personal service in that state or an appearance either in person or by attorney, has no extra-territorial force. The courts so holding seem to concede that a state may adjudge the status of its citizens toward a non-resident, but hold that it cannot fix the status upon such non-resident against his will and without his consent. They hold, therefore, that a state has no power to dissolve the matrimonial relations of a person actually domiciled and residing in another state, who has not been personally served with process and who has not entered an appearance either in person or by attorney. Such a divorce, if granted, will not be recognized in the state of the defendant's domicile.[32] And this is true though the defendant, a non-resident, had actual notice by substituted service of the bringing of the action.[33]

Even if the non-resident defendant was served with a summons in the state of his residence, the decree of divorce will not be recognized in the courts of that state.[34] The fact that the marriage was celebrated in the state where the divorce was granted does not change the rule.[35] A divorce granted against a non-resident defendant upon constructive service only is not a bar to a subsequent suit for divorce or separation, brought by the defendant in the state in which he was domiciled at the time the foreign divorce was granted against him.[36]

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[31] Smith v. Smith, 43 La. Ann. 1140, 10 So. R. 248; Bennington's Succession, 106 La. An. 494, 31 So. R. 123.

[32] These cases arranged as to jurisdiction:

United States. Hekking v. Pfaff, 82 Fed. R. 403.

District of Columbia. Barney v. De Kraft, 6 D. C. 361.

Michigan. Reed v. Reed, 52 Mich. 117, 17 N. W. R. 720; Van Inwagen v. Van Inwagen, 86 Mich. 333, 49 N. W. R. 154.

New York. Bradshaw v. Heath, 13 Wend. (N. Y.) 407; People v. Baker, 76 N. Y. 78; Cross v. Cross, 108 N. Y. 628, 15 N. E. R. 333; Williams v. Williams, 130 N. Y. 193, 29 N. E. R. 98; Winston v. Winston, 165 N. Y. 553, 59 N. E. R. 273.

North Carolina. Irby v. Wilson, 1 Dev. & B. Eq. (21 N. C.) 568; Harris v. Harris, 115 N. C. 587, 20 S. E. R. 187; State v. Schlachter, 61 N. C. 520.

Wisconsin. Cook v. Cook, 56 Wis. 195, 14 N. W. R. 33, 443; Schafer v. Bushnell, 24 Wis. 372.

[33] Williams v. Williams, 130 N. Y. 193, 29 N. E. R. 98; Harris v. Harris, 115 N. C. 587, 20 E. R. 187.

[34] Williams v. Williams, 130 N. Y. 193, 29 N. E. R. 98; Matter

The spouse procuring a decree of divorce in one state, upon constructive service only, cannot impeach its validity in another state. Thus, where a wife procured a divorce in Massachusetts and her husband was served with process in New York, but did not appear nor submit to the jurisdiction of the Massachusetts court, it was held that in a subsequent proceeding for divorce she could not be heard to impeach the validity of the decree which she had procured.[37]

## §37. Same.—Pennsylvania Rule.

In Pennsylvania it is held that, except where the defendant has removed from what was the common domicile, the spouse seeking a divorce must sue in the forum of the defendant's residence, so that where a divorce is granted against a non-resident defendant upon constructive service only, it is void, at least extra-territorially, the court having no jurisdiction.[38] This rule has been applied in the Pennsylvania courts in cases where a husband had left his wife in Pennsylvania and gone to another state and procured a decree of divorce upon constructive service.[39] In such cases the husband's foreign divorce does not destroy the wife's interest in his property, and the wife, notwithstanding the divorce, may take out letters of administration upon his estate after his death.[40] It is also

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of Kimball, 155 N. Y. 62, 49 N. E. R. 331; Matter of House, 20 Civ. Proc. R. 130, 14 N. Y. Supp. 275; Gebhard v. Gebhard, 25 Misc. Ref. 1, 54 N. Y. Supp. 406.

[35] People v. Baker, 76 N. Y. 78.

[36] Van Inwagen v. Van Inwagen, 86 Mich. 333, 49 N. W. R. 154; Cross v. Cross, 108 N. Y. 628, 15 N. E. R. 333; Hamilton v. Hamilton, 26 Misc. Ref. 336, 56 N. Y. Supp. 122.

[37] Starbuck v. Starbuck, 173 N. Y. 503, 66 N. E. R. 193; Matter of Swales, 60 App. Div. 599, 70 N. Y. Supp. 220.

[38] Colvin v. Reed, 55 Pa. St. 375; Reed v. Elder, 62 Pa. St. 308; Platt's Appeal, 80 Pa. St. 501; Fyock's Estate, 135 Pa. St. 522, 19 Atl. R. 1055.

[39] Colvin v. Reed, 55 Pa. St. 375; Reed v. Elder, 62 Pa. St. 308; Hein's Estate, 22 Pa. Sup. Ct. 31.

[40] Fyock's Estate, 135 Pa. St. 522, 19 Atl. R. 1056; Hein's Estate, 22 Pa. Sup. Ct. R. 31.

held in Pennsylvania that a decree of divorce procured upon constructive service in another state against a defendant domiciled in Pennsylvania, forbidding remarriage of the defendant during the life of the plaintiff, has no extra-territorial effect.[41]

### §38. Same.—South Carolina Rule.

In the state of South Carolina there are no divorce laws, and the constitution of the state prohibits the passing of such laws by the legislature. The courts of that state hold that a divorce granted to a wife in a foreign state, on publication of process or constructive service, against her husband domiciled in South Carolina, will not be recognized, and that the full faith and credit clause of the Federal constitution does not require such recognition, the court of the foreign state having acquired no jurisdiction over the defendant. It is also held that the foreign divorce does not bar the wife's right of dower.[42]

There appear to be no decisions in South Carolina as to whether the courts of that state will recognize a foreign divorce based upon personal service. It would seem that if the foreign court had jurisdiction of the subject matter, and granted a decree after personal service on the defendant, within the territorial jurisdiction of the court, the courts of South Carolina, under the full faith and credit rule, would be bound to recognize such decree as valid.

### §39. Rule in Federal Courts.—Atherton v. Atherton and Haddock v. Haddock.

In the case of Atherton v. Atherton, referred to in §28, the Supreme Court of the United States held that where the domicile of the husband is in a particular state, and that state is the only matrimonial domicile, the courts of such state having jurisdiction over the husband and of the subject matter may, by virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom, treating the wife, for the purpose of the dissolution of the marriage, as having her domicile in that state, and, as a result, have power to render a judgment dissolving the marriage, which will be binding on both parties and entitled to recognition in all other states.[43] It is worthy of notice that the case of Atherton v. Atherton did not involve the question of the validity of a divorce granted on constructive service, by a court of a state in which only one of the parties ever had a domicile, nor the question as to what extent inquiry afterward may be made into the good faith of the domicile. The divorce was granted by a court of the state which had always been the unquestioned domicile of the husband, and which was the only matrimonal domicile of the husband and wife. The single question decided was that of the validity of the divorce, granted after constructive notice had been given in the manner required by the statute of the state in which the proceedings were had.

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[41] Van Storch v. Griffin, 71 Pa. St. 240.

[42] McCrery v. Davis, 44 S. C. 195, 22 S. E. R. 178.

The case of Atherton v. Atherton was decided in 1901, the ruling opinion having been written by Mr. Justice Gray. Mr. Justice Peckham wrote a dissenting opinion, in which the chief justice concurred, holding that if the husband, in the state of the matrimonial domicile, had been guilty of misconduct and cruelty toward his wife sufficient to entitle her to a divorce, she would have a legal right, for that reason, to leave him and to acquire a separate domicile even in another state, and, if she did this, the court granting the divorce would not obtain jurisdiction over her as an absent defendant by publication of process or by sending a copy thereof through the mail to her address.

In 1906 a somewhat similar question came before the Supreme Court of the United States in the case of Haddock v. Haddock,[44] on error to the Supreme Court of the State of New York, to review a judgment entered pursuant to an order of the Court of Appeals of that state,[45] affirming a judgment of the appellate division of the Supreme Court for the First Department, which in turn affirmed the judgment of the Supreme Court for the County of New York, entered upon the report of a referee decreeing a separation from bed and board with an award of alimony. In that case it was held by a majority of the members of the Supreme Court of the United States that the mere domicile within a state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable under the Federal constitution in all the other states against a non-resident who did not appear and was only constructively served with notice of the pendency of the action.

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[43] Atherton v. Atherton, 181 U. S. 155, 55 L. Ed. 794, 21 S. C. R. 544.

[44] Haddock v. Haddock, 201 U. S. 561, 50 L. Ed. 867.

[45] Haddock v. Haddock, 178 N. Y. 557, 70 N. E. R. 1099.

The facts in the Haddock case were somewhat different than those in the Atherton case. In the Atherton case the defendant in the original divorce proceeding was considered to be constructively domiciled in the state wherein the decree of divorce was rendered, while in the Haddock case it was considered that the defendant was not so domiciled. In the Haddock case the wife, a resident of the state of New York, sued the husband in that state and there procured personal service on him. The parties were married in New York in 1868, where they both then resided and where the wife continued to reside, and immediately following the marriage the husband abandoned the wife and thereafter failed to support her. A decree of separation from bed and board and alimony was prayed. The defendant admitted the marriage but averred that its celebration was procured by the fraud of the wife, and that immediately after the marriage the parties separated by mutual consent. It also appeared that in 1881 the husband obtained a divorce in the state of Connecticut, which it was claimed was a conclusive defense to the action of the wife in the state of New York. The notice of the pendency of the action in the Connecticut court was by publication only, the wife not being personally served, and she did not enter an appearance in that court. In her action in New York, the wife was granted a decree of separation from bed and board and an award of alimony in the sum of seven hundred and eighty dollars per year from the date of the judgment. This judgment was affirmed by the Court of Appeals of the state of New York, and the record was remitted to the Supreme Court of the state for execution. The husband, claiming that the judgment violated the full faith and credit clause of the Federal constitution, appealed to the Supreme Court of the United States, where the judgment of the New York Supreme Court was affirmed, but by a divided court. Mr. Justice White, who wrote the prevailing opinion, approved the Atherton case but held that where the husband abandons the wife in the matrimonial domicile and the wife remains in that domicile while the husband acquires a domicile in another state, where he obtains a divorce by constructive service, without either personal service or the wife's appearance, the court does not acquire such jurisdiction over the wife as entitles the decree to obligatory recognition in the state of the wife's domicile, though such state may have power to recognize such a decree as a matter of state comity, and the state wherein it was rendered may have the right to enforce it within the limits of its jurisdiction.

It would seem that these two cases, Atherton v. Atherton and Haddock v. Haddock, so far as the majority opinions go, are not at all conflicting in principle as has sometimes been supposed, but when considered together establish the proposition that when a divorce has been granted by a state court in favor of a domiciled citizen and against a nonresident defendant, without appearance or personal service of process, the decree, though it may be enforceable in the state where rendered and may be recognized extra-territorially as a matter of comity, may be disregarded by the courts of sister states without violating the full faith and credit clause of the Federal constitution, unless the defendant, though a nonresident, was constructively domiciled in the state of the forum.

## CHAPTER IV.

## DEFINITION AND NATURE OF MARRIAGE CONTRACT.

§40. Definition.
§41. Nature of Marriage Contract.
§42. Who Capable of Contracting Marriage.
§43. Statutory Definition.
§44. Prohibited Degrees of Consanguinity and Affinity.
§45. Legal Impediments—Spouse Living.
§46. Same—Competency of Parties.

### §40. Definition.

The word marriage signifies, primarily, the act by which a man and woman unite for life, with intent to discharge towards society and each other those duties which result from the relation of husband and wife.[1] It also implies an agreement of the parties, not only to discharge the duties which they owe to each other and to the public, but also to assume the obligations imposed by the laws of the country in which they are domiciled.

### §41. Nature of Marriage Contract.

Many courts have held that marriage is nothing more than a civil contract. It is true that to a certain extent it is a contract, since the law always presumes and requires two parties, of competent understanding, who enter into a mutual agreement which becomes executed by the act of marriage. But it will readily be seen that this agreement differs in many essential particulars from any other contract known to the law. The marriage contract is simply the agreement of the parties to enter into a certain status or relation, the rights, duties and obligations of which are fixed by society in accordance with the principles of natural law, and are above and beyond the control of the parties themselves.

### §42. Who Capable of Contracting Marriage.

The competency of the parties to a marriage contract is fixed, regulated and controlled by the laws of the state or country in which the marriage occurs. The Michigan statute provides that "every male who shall have attained the full age of eighteen years, and every female who shall have attained the full age of sixteen years, shall be capable in law of marriage, if otherwise competent." [2]

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[1] Schouler, Domestic Relations, p. 23.

## §43. Statutory Definition.

The statute also provides that "marriage, so far as its validity is concerned, is a civil contract, to which the consent of parties capable in law of contracting is essential."[3]

Previous chastity is not a requisite to the validity of a marriage, and while marriage is in a very important sense a contract, it is also a relation, governed by rules of public policy which apply to no mere private agreements.[4] Contracting marriage means the actual forming of the marriage relation, and marriages are valid when contracted by parties who are of the legal age of consent and who are otherwise competent; but executory contracts to marry, made by parties under the age of twenty-one years, have not the legal force necessary to sustain an action for breach of promise to marry.[5]

The assent of both parties is as essential to a valid marriage as to any other contract relation. Where one of the parties refused instead of giving consent to the marriage, there was no lawful marriage, even although a marriage ceremony was performed by a minister of the gospel, lawfully authorized to solemnize marriages.[6]

## §44. Prohibited Degrees of Consanguinity and Affinity.

In Michigan the prohibited degrees of consanguinity and affinity as affecting men are as follows: "No man shall marry his mother, grandmother, daughter, granddaughter, step-mother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, nor his sister, brother's daughter, sister's daughter, father's sister, or mother's sister, or cousin of the first degree."[7]

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[2] C. L. '15, (11362); Howell, 2nd. Ed. §11423.

[3] C. L. '15, (11363); Howell, 2nd. Ed. §11424.

[4] Leavitt v. Leavitt, 13 Mich. 456. "Those frauds which will invalidate a marriage are usually, at least, such as negative any consent to be married at all, without reference to previous inducements. The commoner cases are duress; surprise or stratagem in procuring the marriage itself to be carried out, and the fraud must usually be nearly, if not absolutely, coincident in time with the marriage, and operate to destroy that intelligent consent which is required for the marriage itself."

[5] Frost v. Vought, 37 Mich. 65.

[6] Roszel v. Roszel, 73 Mich. 133.

The prohibited degrees as affecting women are as follows: "No woman shall marry her father, grandfather, son, grandson, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, nor her brother, brother's son, sister's son, father's brother, mother's brother, or cousin of the first degree."[8]

The prohibition of marriage within the degrees of consanguinity and affinity named, applies whether the parties are legitimate or illegitimate, and it makes no difference whether the parties are of the whole or half blood.[9]

### §45. Legal Impediments;—Spouse Living.

The statute forbids the contracting of marriage where either of the parties has a former husband or wife living, unless the marriage with such former husband or wife has been dissolved.[10]

### §46. Same—Competency of Parties.

No insane person, idiot, or person who has been afflicted with syphilis or gonorrhea, and who has not been cured, is competent to marry. The statute formerly prohibited marriage between white persons and persons of African descent, but that prohibition has been removed, and all such marriages heretofore contracted are declared valid for all purposes, and the issue of such marriage is declared legitimate. The statute also makes it a felony for any person to marry who has been afflicted with syphilis or gonorrhea and who has not been cured. In all prosecutions under this statute a husband or wife may testify without the consent of the other spouse, and any physician who has attended or prescribed for any husband or wife for such diseases may be compelled to testify to any facts discovered by him from such attendance.

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[7] C. L. '15, (11364); Howell, 2nd. Ed. §11425.

[8] C. L. '15, (11365); Howell, 2nd. Ed. §11426.

[9] People v. Jenness, 5 Mich. 318; Bishop on Mar. and Div. §216.

[10] C. L. '15, (11366); Howell, 2nd. Ed. §11427.

Persons who have been confined in any public institution as epileptic, feeble-minded, imbecile, or insane patients, are prohibited from contracting marriage without filing in the office of the county clerk, before the issuing of a marriage license, a verified statement from two regularly licensed physicians of this state that a cure has been affected, and that there is no probability that such persons will transmit any such defects or disabilities to the issue of such marriage.[11]

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[11] C. L. '15, (11367); Howell, 2nd. Ed. §11423.

# CHAPTER V.

## MODE OF SOLEMNIZING MARRIAGES.

§47. Who May Solemnize Marriage.
§48. One of the Parties to be Examined under Oath.
§49. No Particular Form of Ceremony Required.
§50. Common Law Marriages.
§51. Punishment for Unauthorized Marriages.
§52. Want of Authority of Magistrate or Clergyman.
§53. Denominational Rites.

### §47. Who May Solemnize Marriage.

Marriages may be solemnized in Michigan by any justice of the peace or judge of probate in the county in which he was chosen, by a judge of a municipal court in the municipality in which he was chosen, and throughout the state by any minister of the gospel who has been ordained or authorized to solemnize marriages, according to the usage of the denomination to which he belongs, and who is a pastor of any church or churches in this state, or who shall continue to preach the gospel in this state.[1]

It is a general rule that a marriage which is valid where it is celebrated is valid everywhere, and it has sometimes been held that the converse of this rule is true.[2] There are some exceptions to this rule, however, which will be discussed under another subject. While the statute authorizes a justice of the peace, probate judge, or judge of a municipal court to solemnize marriages only in the county or municipality in which he was chosen, still if any such officer should solemnize a marriage outside his county or municipality, between competent parties, and such marriage is followed by the parties' living and cohabiting together as husband and wife, it is a valid marriage for all purposes.[3]

The validity of a marriage solemnized in another state must be determined by the laws of such state. This is especially true where the question of the validity of such marriage arises in a criminal prosecution. Thus, where in a prosecution for bigamy the first marriage is alleged to have been celebrated in another state, proof not only of a marriage in fact but of a valid marriage according to the laws of that state must be made by the prosecution. And if it appears that the law of the state where the first marriage was celebrated is statutory, it cannot be presumed, against the presumption of innocence of the defendant, that such law is the same as that of the state where the prosecution is had, but it must be proved by copies, authenticated in some manner authorized by law.[4]

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[1] C. L. '15, (11368); Howell, 2nd. Ed. §11429.

[2] Hutchins v. Kimmell, 31 Mich. 131.

[3] People v. Girdler, 65 Mich. 68.

### §48. One of the Parties to be Examined under Oath.

Persons authorized to perform marriage ceremonies in Michigan are required, before doing so, to examine at least one of the parties on oath as to the legality of the intended marriage, and such persons are authorized to administer oaths for that purpose.[5] While the neglect of the magistrate or minister to comply with this provision of the statute probably would not invalidate the marriage, especially if it should be followed by the parties to the marriage living and cohabiting together as husband and wife and certainly would not bastardize the offspring of such marriage, still, for his own protection, the magistrate or clergyman always should observe this requirement strictly according to the statute.[6]

### §49. No Particular Form of Ceremony Required.

In solemnizing marriages in Michigan no particular form of ceremony is required to be used, except that the parties must solemnly declare, in the presence of the officiating magistrate or clergyman and the attending witnesses, that they take each other as husband and wife, and there must be at least two witnesses to the marriage besides the officiating magistrate or clergyman.[7]

### §50. Common Law Marriages.

The marriage relation may be established without any actual, formal ceremony by a magistrate or clergyman, if the parties are competent to marry and agree to take each other as husband and wife, and such agreement is followed by continued cohabitation as such.[8]

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[4] People v. Lambert, 5 Mich. 349. (It is no defense to a charge of bigamy that the second marriage was between a negro and a white woman and void under the statute); People v. Brown, 34 Mich. 339.

[5] C. L. '15, (11369); Howell, 2nd. Ed. §11430.

[6] Bonker v. People, 37 Mich. 10.

[7] C. L. '15, (11370); Howell, 2nd. Ed. §11431.

In the case of Peet v. Peet, 52 Mich. at page 467, Justice Cooley, who wrote the opinion, says: "But an actual ceremony of marriage is not essential to the establishment of the relation of husband and wife; it is sufficient that a man and woman of due competency, in respect to whom no impediment exists, consent to take each other as husband and wife and actually cohabit as such. The case of Hutchins v. Kimmell, 31 Mich. 126, 18 Am. R. 164, determines this for this state, and refers to many decisions in other states, to the same effect."[9]

But where a man and woman agreed to live together as man and wife, and by the terms of such agreement each party retained the right to control and dispose of his or her own property without question by the other, it was held by a majority of the Supreme Court that the relation of the parties was that of concubinage and not a valid marriage, although the agreement was followed by continued cohabitation for a considerable time. Justice Morse dissented from the opinion of the majority of the court, and contended that the written agreement between the parties was a valid contract of marriage, and, being followed by cohabitation, established a valid marriage.[10] The written agreement entered into between the parties did not contain a declaration of the parties that they agreed to take each other as husband and wife, but that they agreed "to live together as man and wife."

Where the relationship of a man and woman living together is illegal in its commencement, it is presumed to continue illegal until a changed relationship is proved. Subsequent actual marriage will not be presumed from continued cohabitation and reputation after the legal impediment to entering into such a contract is removed.[11]

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[8] Peet v. Peet, 52 Mich. 467; Hutchins v. Kimmell, 31 Mich. 126; Williams v. Kilburn, 88 Mich. 279; Flannagan v. Flannagan, 122 Mich. 387; Knights of Maccabees v. McAllister, 132 Mich. 69.

[9] Peet v. Peet, 52 Mich. 467.

[10] Clancy v. Clancy, 66 Mich. 202, 33 N. W. 889.

[11] Rose v. Rose, 67 Mich. 619, 35 N. W. 802; Van Dusan v. Van Dusan, 97 Mich. 70, 56 N. W. 234.

## §51. Punishment for Unauthorized Marriages.

The statute provides that "if any person shall undertake to join others in marriage, knowing that he is not lawfully authorized to do so, or knowing of any legal impediment to the proposed marriage, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail not more than one year, or by fine not less than fifty nor more than five hundred dollars, in the discretion of the court."[12]

This statute applies to a marriage where either of the parties is under the age of consent. The fact that the marriage is prohibited by the statute, by reason of one or both of the parties being under the age of consent, is no defense to a prosecution under this section. Such marriage is not absolutely void, but only voidable at the option of the incompetent party.

In the case of Bonker v. People the charge made in the information was that the respondent, "being then and there a justice of the peace of said township and in and for said county, unlawfully did undertake to join in marriage Frank Bogart and Ann Eliza Davis, she, the said Ann Eliza Davis, being then and there a female under the age of sixteen years, to-wit: of the age of thirteen years, and not capable in law of contracting marriage; and the age of said Ann Eliza Davis being then and there a legal impediment to the said proposed marriage, he, the said William Bonker, then and there and at the time he undertook to join the said Frank Bogart and the said Ann Eliza Davis in marriage, well knowing that the said Ann Eliza Davis was then and there a female under the age of sixteen years." On behalf of the respondent it was contended that an "impediment" within the meaning of the statute is only that which absolutely precludes the marriage being formed, such as relationship within the prohibited degree or a previous marriage not dissolved, and that as a marriage of a party under the age of consent would not be void, but only voidable, the want of legal age of consent would not constitute an impediment to the marriage.

In considering this question the Supreme Court say: "This argument would apply equally well to a marriage accomplished by force or fraud, such marriages being voidable only, and would protect a magistrate though the facts were all known to him. We doubt the validity of this argument, and should be inclined to hold that whatever is in the way of a valid marriage must be understood to constitute such an impediment as the statute has in view. The statute authorizes certain marriages and does not authorize others; it points out what should prevent or impede them. But it is not necessary to rest the case upon this view, for when the statute does not authorize a certain marriage, the magistrate cannot be 'authorized' to join the persons in marriage. The age of consent in a female is fixed by the statute at sixteen years; and though the law, in view of the serious consequences which might follow from treating all marriages void where one of the parties is under the age of consent, holds them voidable only, it nevertheless does not authorize them. Like a fraudulent marriage they are unauthorized, for consent is the first requisite in marriage, and in this case the capacity to consent is withheld by law."[13]

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[12] C. L. '15, (11372); Bonker v. People, 37 Mich. 4.

## §52. Want of Authority of Magistrate or Clergyman.

Marriages solemnized before any person professing to have authority to act in such capacity are not deemed void for want of jurisdiction or authority in such person if the marriage is consummated, with a full belief on the part of the parties so married or either of them, that they have been lawfully joined in marriage.[14]

## §53. Denominational Rites.

The statute, so far as it relates to the manner of solemnizing marriages, does not affect marriages among Quakers, nor marriages among people of any other denomination having, as such, any peculiar mode of solemnizing marriages.[15]

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[13] Bonker v. People, 37 Mich. 4.

[14] C. L. '15, (11373); Howell, 2nd. Ed. §11434.

[15] C. L. '15, (11374); Howell, 2nd. Ed. §11435.

# CHAPTER VI.

## PROOF OF MARRIAGE.

§54. Certificates and Licenses as Evidence.
§55. Record of Marriages Continued.
§56. Duty of County Clerk.
§57. Marriage Licenses.
§58. Affidavit of Party Applying for License.
§59. Duties of County Clerk.
§60. Duty of Magistrate or Clergyman.
§61. Penalties for Violation.
§62. Record as Evidence.
§63. Marriages to Protect Reputation.
§64. Application For a License—Form of Application.
§65. Judge of Probate to File Papers—Inspection of Record.
§66. Privilege—Penalties for Divulging or Publishing, Etc.

### §54. Certificates and Licenses as Evidence.

"The original certificate and records of marriage made by a minister or a justice, as prescribed in this chapter, and the record thereof made by the county clerk, or a copy of such record duly certified by such clerk, shall be received by all courts and places as presumptive evidence of the fact of such marriage."[1]

### §55. Record of Marriages Continued.

All persons authorized by law to solemnize marriages in this state are required by statute to make a record of such marriage so solemnized by them, and every clerk or keeper of the records of the meetings in which any marriage among Friends or Quakers shall be solemnized, is also required to make a record of such marriage, together with all of the facts relating to the same. They are also required to deliver on demand to either of the parties so joined in marriage a certificate of such marriage, containing all of the facts in relation thereto. Within ninety days after such marriage a certified copy of such certificate must be delivered to the clerk of the county in which such marriage took place and a fee of twenty-five cents paid for recording the same.[2]

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[1] C. L. '15, (11375); Howell, 2nd. Ed. §11436.

If the certificate signed by the officiating magistrate or minister is filed with the county clerk within the time required by the statute, it is competent evidence of the fact of marriage without proof of the signature of the officiating magistrate or minister; but if not filed within that time other evidence of the marriage must be produced.[3]

## §56. Duty of County Clerk.

It is the duty of the county clerk, on receiving the certificate of such marriage, to record the same at length in a book to be provided at the expense of the state, by the secretary of state. Such book must be properly indexed, using the names of both parties to the marriage, and the marriages numbered and recorded in the order in which the certificates are received. The record of marriages must state, in separate columns, the Christian and surnames of the bridegroom and bride, the maiden name of the bride if a widow, the color, age and place of birth of each, the residence of each at the time of the marriage, the occupation of the bridegroom, and the name and official status of the persons by or before whom they were married; the name and residence of at least two witnesses present at such marriage, and the date when such record was made.[4]

The record of marriages is not regarded in law as the best evidence of the fact, and, except in criminal cases and actions for seduction or criminal conversation, the marriage may be proved by other evidence, such as that the parties have jointly signed papers in that relation, have lived together as husband and wife and raised a family, have treated each other on all occasions as husband and wife, are accustomed to address each other as such, and were so regarded by their family, relatives, friends, and neighbors.[5]

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[2] C. L. '15, (5613); Howell, 2nd. Ed. §1556; Pub. Acts 1905, Page 508, as to registration of births.

[3] People v. Etter, 81 Mich. 570. This was a prosecution for carnal knowledge of a girl under the age of consent, and as bearing on the age of the girl the prosecution was permitted to put in evidence what purported to be a certificate of the marriage of the girl's father and mother, purporting to have been made by the justice who performed the marriage ceremony. The certificate bore date December 17, 1873, but was not filed in the county clerk's office until March 22, 1889, while the trial was in progress. It was conceded that the justice was dead and no evidence was offered showing his hand writing. The Supreme Court held that if the paper had been filed with the county clerk within ninety days after the marriage, as the statute required, it would have been competent evidence, but to allow it to be brought in after such a lapse of time was not permissible and it should have been excluded.

[4] C. L. '15, (5613); Howell, 2nd. Ed. §1557.

In actions involving adultery, seduction, or criminal conversation, the criminal intercourse must be substantially averred and there must be proof of an actual marriage. In such cases proof of general reputation, or that the parties were accustomed to address each other as husband and wife, is not sufficient.[6]

## §57. Marriage Licenses.

It is necessary for all parties intending to be married in Michigan to obtain a marriage license from the county clerk of the county in which one of the parties resides, and to deliver such license to the magistrate or clergyman who is to officiate, before the marriage ceremony can be performed. If neither of the parties to be married reside in this state, it is necessary to procure such license from the county clerk of the county in which the marriage ceremony is to be performed.[7]

The secretary of state is required to prepare and furnish to the several county clerks of the state, blank forms for marriage license and certificate, also books of registration. The blank forms for license and certificate must be made in duplicate, and provide space for the entry of the full name, age, color, place of residence, place of birth, occupation, and, if known, the father's name and mother's maiden name of both of the parties to be married, the number of times either of the parties may have been previously married, the bride's maiden name in case she is a widow, the date of giving the license, the names and residences of two witnesses to the marriage, and the certification of the officiating clergyman or magistrate that the marriage contemplated by the license has been performed by him.[8]

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[5] Proctor v. Bigelow, 38 Mich. 282.

[6] Perry v. Lovejoy, 49 Mich. 529, 14 N. W. 485; Hutchins v. Kimmell, 31 Mich. 126.

[7] C. L. '15, (11376); Howell, 2nd. Ed. §11437.

[8] C. L. '15, (11377); Howell, 2nd. Ed. §11438.

## §58. Affidavit of Party Applying For License.

The party applying for a license to marry must cause an affidavit to be made and filed with the county clerk containing the necessary allegations, under the laws of this state, of the competency of the parties to unite in the bonds of matrimony. Such affidavit, together with the license, is made a matter of record in the county clerk's office.[9]

## §59. Duties of County Clerk.

The county clerk is required to fill out the blank spaces of the license according to the sworn answers of the applicant taken before him or some person duly authorized by law to administer oaths. If the application is for the marriage of a female who has not attained the age of eighteen years, it is the duty of the county clerk to whom such application is made to require the written consent of one of the parents of such female, or of her legal guardian, to the marriage of such female and to the issuing of the license for which application is made, unless such female have no parent or guardian living. Such written consent is required to be preserved on file in the office of the county clerk.

The county clerk is entitled to a fee of fifty cents for his services, and he is required to make a correct copy of the affidavit and license in the book of registration of marriages. The license, together with the blank form of certificate, must be delivered by the applicant to the clergyman or magistrate who is to officiate at the marriage. After the marriage has been solemnized, the clergyman or magistrate who officiated must return the license, with his certificate that the marriage has been performed, and the clerk must record in the book of registration of marriages the names and residences of the witnesses to the marriage and the name of the officiating clergyman or magistrate. All such licenses and certificates must be preserved on file in the office of the county clerk, and as often as once in three months the clerk is required to make a report to the secretary of state of all licenses and certificates issued by him since his last report.[10]

The marriage license and the certificate of the officiating magistrate or clergyman, and the record thereof in the office of the county clerk, are public records. They are open to inspection for any lawful purpose and the clerk has no right to withhold them. Mandamus will lie by the publisher of a newspaper to require him to permit reporters of the paper to examine them, and he has no discretion to withhold them from inspection when, in his opinion, publication of their contents is undesirable.[11]

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[9] C. L. '15, (11377); Howell, 2nd. Ed. §11438.

[10] C. L. '15, (11378); Howell, 2nd. Ed. §11439.

All officers having the custody of any county, city, township, town, village, school district, or other public records, are required by statute to furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, and for making memoranda and transcripts therefrom during the usual business hours, to all persons having occasion to examine them for any lawful purpose. The custodian of such records may make such reasonable rules and regulations with reference to such inspection and examination as shall be necessary for the protection and preservation of such records and files, and to prevent interference with the regular discharge of the duties of his office. The use of pen and ink in making memoranda, copies or notes of such records and files, is prohibited by statute.[12]

## §60. Duty of Magistrate or Clergyman.

The magistrate or clergyman who officiates at any marriage is required to fill out the blank spaces of his certificate and return, stating the name and residence of two witnesses over his own signature in certification that the marriage has been performed by him. Such magistrate or clergyman must separate the duplicate license and certificate and retain one half for his own record and return the other half to the county clerk issuing the same within ten days after the marriage.[13]

## §61. Penalties for Violation.

Any county clerk who refuses to give a license to persons properly applying and legally entitled to be married, or who shall violate any of the provisions of the statute in relation to marriages, shall be adjudged guilty of a misdemeanor and on conviction may be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, and in default of payment of such fine, by imprisonment in the county jail not more than thirty days.[14]

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[11] Kalamazoo Gazette Co. v. County Clerk, 148 Mich. 460, 101 N. W. 1070.

[12] C. L. '15, (3448); Howell, 2nd Ed. §1449; P. A. 1913, Page 102.

[13] C. L. '15, (11379); Howell, 2nd. Ed. §11441.

"Any clergyman or magistrate who shall join together in marriage parties who have not delivered to him a properly issued license, as provided for in this act, or who shall violate any of the provisions of this act, shall be adjudged guilty of a misdemeanor, and shall be punished by a fine of one hundred dollars, or in default of payment thereof, by imprisonment in the county jail for a term of ninety days."[15]

In the case of People v. McLaughlin, 108 Mich. 516 (66 N. W. 385), it was charged that the respondent, a clergyman, "did join together in marriage James F. McNames and Emma Nogle, they nor either of them having delivered to him a properly issued license." The trial resulted in conviction. At the time the marriage ceremony was performed James McNames had a former wife living. He represented to the clergyman that he had applied for a license and that it had been issued and at the time of the marriage was on its way in the mail, although as matter of fact he had made no such application and no license had been issued to him. After trial and conviction the respondent appealed, and on the hearing in the Supreme Court two questions were raised by his counsel. First, that the statute under which the prosecution was brought was unconstitutional and void because the act embraced more than one object. Second, that the performance of the marriage ceremony was a nullity for the reason that one of the parties was incompetent to marry, and consequently the respondent could not legally, and therefore did not, join the parties together in marriage. The Supreme Court held that the law was constitutional and that the title of the act, "An act requiring a civil license in order to marry and the due registration of the same, and to provide a penalty for a violation of the provisions of the same." was broad enough to cover the provisions of the act, and that its provisions are all germane to the object expressed in the title. As to the second question, the court overruled the contention of respondent's counsel with little comment, saying: "It is only necessary to state these propositions to show how illogical they are," and holding that the fact that one of the parties was under a legal disability to enter into the marriage relation was no defense.[16]

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[14] C. L. '15, (11380); Howell, 2nd Ed. §11441.

[15] C. L. '15, (11381); Howell, 2nd. Ed. §11442; People v. McGlaughlin, 108 Mich. 516, 66 N. W. 385.

The statute further provides that "any person whose duty it shall be to return a marriage certificate to the county clerk, who shall neglect to return such certificate, shall be adjudged guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars or ninety days' imprisonment, or both, in the discretion of the court.[17]

Any applicant for a marriage license who swears to a false statement in the application is guilty of perjury, and may be punished therefor under the general laws of the state.[18]

All reports of marriages sent by county clerks to the secretary of state are required to be preserved on file in the office of the secretary of state, and a proper record made thereof and kept.[19]

### §62. Record as Evidence.

The record of any license to marry, or of any marriage certificate, in any county clerk's office, or certified copy of such record, is *prima facie* evidence in any court or proceedings in this state, with the same force and effect as though the original were produced, both as to the facts therein contained and as to the genuineness of the signatures thereto.[20]

### §63. Marriages to Protect Reputation.

While, as has been shown, the record of marriages kept in the office of the county clerk is a public record and open to inspection for any lawful purpose, the statute provides that for the protection of the reputation and good name of certain persons under certain circumstances, the judge of probate may issue a marriage license, perform the marriage ceremony, and make a record thereof, which is not open to public inspection by anyone for any purpose, unless by order of a court of competent jurisdiction on certain conditions.[21]

The statute provides that "the judge of probate of each county in this state shall have authority and it shall be his duty to issue, without publicity, a marriage license to any female making application to him under oath containing a statement that she is with child, which if born alive before her marriage will become a bastard, or has lived with a man and had been considered as his wife, or, for other good reason expressed in such application and deemed sufficient by the judge of probate, desires to keep the exact date of the marriage secret to protect the good name of herself and the reputation of her family."[22]

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[16] People v. McGlaughlin, 108 Mich. 516, 66 N. W. 385.

[17] C. L. '15, (11382); Howell, 2nd. Ed. §11443.

[18] C. L. '15, (11383); Howell, 2nd. Ed. §11444.

[19] C. L. 15, (11384); Howell, 2nd. Ed. §11445.

[20] C. L. '15, (11385); Howell, 2nd. Ed. §11446; Cummins & Beecher's Mich. Judicature Act, §654.

[21] C. L. '15, (11387); Howell, 2nd. Ed. §11448.

Under this statute the judge of probate has authority to marry persons under marriageable age in cases where the female is with child or where she has been living with some man as his wife, in case the application for such license is accompanied by the written request of the parents of both parties, if living, and their guardian or guardians if either or both of the parents are dead, or by the written request of the parent or guardian, as the case may be, of the one under marriageable age as fixed by the statute, when, according to his judgment, such marriage would be a benefit to public morals.[23]

### §64. Application For a License—Form of Application.

The application for a license to marry under the act entitled "An Act to Provide for the Protection of the Reputation and Good Name of Certain Persons" is required to be in the usual form.

In addition to the usual form, the application must state that the female is with child or that she has lived with a man and been considered his wife, and it must be accompanied by a fee of three dollars, two dollars of which is for the judge of probate for his services, and one dollar for the secretary of state as his fee for performing the services required of him by the statute.

Upon the filing of the application and issuing of the license it is the duty of the judge of probate to perform the marriage ceremony unless the applicant or one of the parties to the contemplated marriage desires to have the ceremony performed by some other person competent to solemnize marriages, in which case the judge of probate is required to issue a written permit to the person designated by the applicant or contracting parties, directing him to perform such marriage ceremony. The party so designated, if competent to perform the marriage ceremony under the general laws of the state, is thereby empowered to perform such marriage ceremony, but no record, except the record made by the judge of probate pursuant to the statute, shall be made of such marriage. Upon the performance of such marriage ceremony, the person performing it is required to return the marriage certificate to the judge of probate, who then is required to attach the certificate and license to the application. All of the papers are required to be executed in duplicate, and the person who performs such marriage ceremony is required to deliver a certificate of such marriage to the bride.[24]

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[22] C. L. '15, (11387); Howell, 2nd Ed. §11448.

[23] C. L. '15, (11387); Howell, 2nd. Ed. §11448.

### §65. Judge of Probate to File Papers;—Inspection of Record.

The judge of probate is required to file all the papers in such case in a private file, and, within ten days after the marriage, forward the duplicate thereof to the secretary of state, who is also required to keep such duplicate in a private file and to record the same in a private register.

Such private file in the probate court, and the duplicate and record thereof in the office of the secretary of state, are open to inspection, only on a written order of a judge of the circuit court, or of the supreme court, and only for the use designated in the order. No such order can be made except upon the written request of the person or persons who were so married, or when necessary to the protection of property rights arising from or affected by such marriage.[25]

### §66. Privilege—Penalties for Divulging or Publishing, Etc.

All knowledge of any facts concerning such marriages which shall come to the judge of probate or secretary of state, or to their deputies or assistants, or to the witnesses to such marriages, or to the physician endorsing the application, under any license issued pursuant to the provisions of the act authorizing such marriages is privileged.

Any violation of such confidence and privilege by any of such persons is a misdemeanor, and is punishable by a fine of not less than twenty-five dollars nor more than one hundred dollars, and the costs of prosecution, and in default of payment of the fine imposed, by imprisonment in the county jail not more than three months.

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[24] C. L. '15, (11388); Howell, 2nd. Ed. §11449.

[25] C. L. '15, (11389); Howell, 2nd. Ed. §11450.

The giving of publicity to any such license, or to any marriage held under the provisions of the act, is also a misdemeanor, and is punishable by a fine or imprisonment, and, in addition thereto, the editor, publisher or proprietor of any newspaper or publication in this state, giving publicity to any such license or marriage, is liable in an action of libel to the parties married under such license.

In case the judge of probate neglects to make a proper return of such marriages, he is liable to a fine not exceeding fifty dollars in addition to the penalty prescribed by the general laws of this state.[26]

If the applicant is an orphan and has no guardian and is under marriageable age, a guardian must be appointed for such applicant and his written request obtained before a license can be issued or the marriage ceremony performed.[27]

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[26] C. L. '15, (11390); Howell, 2nd. Ed. §11451.

[27] People v. Schoonmaker, 119 Mich. 242, 77 N. W. 934.

# CHAPTER VII.

## PRESUMPTIONS.

§67. Presumptions of Validity of Marriage.
§68. Conflicting Presumptions.
§69. Conflict of Laws.
§70. Indian Customs.
§71. Incestuous and Polygamous Marriages.
§72. Marriages—When void.
§73. Marriage More than a Civil Contract.
§74. Purpose of Statutory Definition.
§75. Voidable Marriages.
§76. Who May Annul Voidable Marriages.
§77. Who May Annul Marriage for Fraud or Duress.

### §67. Presumptions of Validity of Marriage.

When a formal ceremony of marriage, followed by cohabitation, is shown between persons competent to enter that relation, the law raises a presumption that the marriage is valid and that the person performing the ceremony was legally authorized to perform the same, and this presumption can be overcome only by clear and convincing evidence to the contrary.[1]

It is held in the State of Illinois that when the celebration of a marriage has been shown, the contract of marriage, the capacity of the parties, and in fact everything necessary to the validity of the marriage will be presumed, in the absence of proof to the contrary.[2] The same rule prevails in Michigan, and it seems is one of universal application in this country.

In the case of People v. Schoonmaker, 117 Mich. 190; 75 N. W. 439, the respondent was charged with statutory rape. The complaining witness was under the age of consent at the time the offense was alleged to have been committed, and when she was called to the stand as a witness she was interrogated by respondent's counsel as to her competency. From her examination it appeared that she had gone through the form of a marriage ceremony with the respondent before the judge of probate. The prerequisite conditions required by Act No. 180, Public Acts of 1897, were not affirmatively shown by the respondent nor testified to by the witness and it did not appear that the statute had been complied with in that regard. The trial court held that this fact overcame the presumption of the validity of the marriage and permitted the witness to testify. On appeal, the supreme court held that this view could not be sustained, and that the presumption arising from the fact of the ceremony of marriage before an officer authorized to perform it is in favor of the regularity and legality of the act, citing 2 Wharton on Evidence, §1297, and Bishop on Marriage and Divorce, §946. The precise question presented was whether the wife was a competent witness to the act charged as occurring before the marriage, and it was held that she was not, and a new trial was ordered.[3]

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[1] Meginson v. Meginson, 14 L. R. A. 544.

[2] Cartwright v. Gowan, 121 Ill. 388.

On a second trial it was shown that the parties went through a ceremony of marriage, and that such ceremony took place on the petition of Maud Breen, the complaining witness, without any consent by parent or guardian, and that after the ceremony the parties made arrangements to go to housekeeping but never in fact lived together, either before or after the complaining witness became of the age of sixteen years, she being sixteen years and three months of age at the time her testimony on the second trial was given. This trial resulted in another conviction, and on appeal to the supreme court it was held by that court that the marriage was void and the complaining witness competent to testify.[4]

The judgment on the first trial seems to have been reversed and a new trial granted because the legal presumption of the legality of the marriage ceremony was not overcome. On the second trial that presumption was overcome by proof that showed that the marriage was void and not merely voidable.

## §68. Conflicting Presumptions.

Cases frequently arise in which certain disputable presumptions in regard to the marriage relation are conflicting. In such cases it becomes important to determine which presumption prevails if neither is aided by proof of coöperating facts or circumstances.

The weight of authority seems to be that in such cases the presumption arising from the later act must prevail over that which arises from facts and circumstances which occurred earlier. Thus where the presumption of marriage arising from the performance of a ceremony conflicts with a presumption of the continued life of a former spouse of one of the parties, if neither is aided by facts or circumstances coöperating with it, the presumption of the validity of the marriage will prevail over the other.[5] It has also been held that the presumption of life will yield in favor of the presumption of innocence.[6]

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[3] People v. Schoonmaker, 117 Mich. 195, 75 N. W. 439.

[4] People v. Schoonmaker, 119 Mich. 242, 77 N. W. 934.

Also, in an action to settle property rights depending upon the validity of a marriage by a man who had a wife living and from whom he had been separated for eight years, and who in the meantime had married again, it was held that the law will presume a divorce between them, and that the man's second marriage was valid if nothing to the contrary is shown.[7]

Positive evidence of non-assent to a marriage ceremony that has been performed raises a presumption against the validity of the marriage and should be considered by courts and juries.[8]

While reputation may be considered as evidence to establish a marriage, and is very important when the fact of a marriage is in doubt, it is only one of the circumstances from which a marriage, legal or otherwise, may be inferred. When a marriage in fact is made out, whether by formal ceremony or otherwise, it must stand though all the community say and believe it to be illegal. But upon doubtful facts the court ought to presume a lawful marriage rather than a notorious act of immorality.[9]

## §69. Conflict of Laws.

When the validity of a marriage is questioned, it always becomes important to determine whether the marriage was valid in the state or country where it was solemnized.

It is a principle of universal law that a marriage valid in a country where it occurred is valid everywhere, and it will be held valid in countries where the parties may be domiciled, even though it would have been invalid by the laws of the subsequent domicile if it originally had been celebrated there.[10]

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[5] Johnson v. Johnson, 114 Ill. 611, 55 Am. Rep. 883.

[6] Lockhart v. White, 18 Tex. 110.

[7] Carroll v. Carroll, 20 Tex. 740; Blanchard v. Lambert, 43 Iowa 228; Harris v. Harris, 18 Ill. App. 57.

[8] Kopke v. People, 43 Mich. 41, 4 N. W. 551.

[9] Peet v. Peet, 52 Mich. 464-467, 18 N. W. 220.

### §70. Indian Customs.

Marriages between members of Indian tribes in tribal relations valid by the Indian laws, contracted at a time when there was no act of Congress on the subject, are recognized by the state courts as valid. Indians in tribal relation are not subject to state laws.[11]

### §71. Incestuous and Polygamous Marriages.

It seems, however, that incestuous and polygamous marriages, celebrated in countries where such marriages are permitted, are nevertheless treated as invalid here, because they are condemned by the common voice of civilized nations, which establishes a common law forbidding them.[12] The same reasons which condemn polygamous and incestuous marriages sustain marriages by mere agreement when followed by cohabitation, and the same common law protects them.

### §72. Marriages;—When Void.

Marriages may be either absolutely void or only voidable. When between persons within the prohibited degree of consanguinity or affinity they are absolutely void.

All marriages solemnized when one of the parties was insane or an idiot, if solemnized in this state, are void, but the issue of any such marriages, except those contracted when one or both of the parties thereto has a living husband or wife, is deemed legitimate.[13]

The question has been raised in this state as to whether a bigamous marriage, entered into by the woman in good faith, while the man had knowledge that he had a lawful wife living in another state, becomes valid after the removal of the impediment by the death of the first wife and continued cohabitation by the living parties, where the woman never learned of the existence or death of the former wife, and the man was ignorant of her death. The circuit court held the marriage valid, and upon appeal to the supreme court the judgment of the circuit court was affirmed by equal division.[14]

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[10] Hutchins v. Kimmell, 31 Mich. 126.

[11] Kobogum, v. Mining Co. 76 Mich. 498, 43 N. W. 602.

[12] Hutchins v. Kimmell, 31 Mich. 134; Horton on Conflict of Laws, §180.

[13] C. L. '15, (11391); Howell, 2nd. Ed. §11453; In Re Fitzgibbon's Estate, 162 Mich. 416, 127 N. W. 313.

In other states there seems to be a decided conflict of authority on the subject.

It would seem to be in the interest of public policy and good morals that when a woman enters into the marriage relation in good faith, bearing all of its burdens, and, assuming all of the duties of a wife in that relation, becomes the mother of children, honestly believing them to be the offspring of a lawful marriage, and such relations continue in good faith after the impediment is removed, she should not be characterized or placed in the same category as a harlot, and as though she had knowingly entered into meretricious relations. No one can reasonably urge, in furtherance of good morals, public policy, or the sacredness of the marriage relation, that children born under such circumstances should be characterized as illegitimate. It would be a cruel law that would accomplish such results, and it is to be hoped that such will never be the law of this country.

## §73. Marriage More than a Civil Contract.

While it is declared by statute in this state, and in many others, that "marriage so far as its validity is concerned is a civil contract, to which the consent of parties capable in law of contracting is essential",[15] still it involves something more than a mere contract, for when once formed a relation is created between the parties which they cannot change, the rights and obligations of which depend not upon their agreement, but upon the law, written or unwritten.[16] In Michigan the contract of marriage will not be presumed when such presumption would do violence to facts fully covered by the proofs. But in case of a formal marriage, where the woman already had a living husband against whom she had applied for a divorce, which she obtained subsequent to the second marriage, if the parties agree, after the granting of the divorce, that they will live and cohabit together as husband and wife, and they continue to do so for any considerable period, such agreement and subsequent cohabitation constitute a legal and valid marriage.[17] In such case, while the first marriage was void and cohabitation unlawful before the decree of divorce was granted, after it was granted the parties became competent to enter into a new marriage contract.[18]

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[14] In Re Fitzgibbon's Estate, 162 Mich. 416.

[15] C. L. '15, (11362); Howell, 2nd. Ed. §11424.

[16] Maynard v. Hill, 125 U. S. 190, L. Ed. 654.

[17] Williams v. Kilburn, 88 Mich. 279, 50 N. W. 293; Flanagan v. Flanagan, 116 Mich. 185, 74 N. W. 460.

In the State of Nebraska the only thing essential to a valid marriage is the consent of parties competent to contract to enter into the relation of husband and wife. If the parties live together, intending to sustain toward each other the relation of husband and wife, they are, in the absence of any legal impediment to that relationship, legally married.[19] And even where the parties originally came together under a contract of marriage, void because forbidden by statute, when the statutory impediment is removed they are at liberty to enter into a new contract of marriage, and such marriage may be shown either by their express agreement to sustain toward each other the relation of husband and wife, or by proof of acts of recognition, continued matrimonial cohabitation, and general reputation.[20]

If the cohabitating parties desire and consent to assume matrimonial relations, and know of an impediment, they may be presumed to have consented to do so in a reasonable time after the impediment is removed, if cohabitation continues for any considerable period of time.[21]

### §74. Purpose of Statutory Definition.

The statute of Nebraska contains substantially the same provisions as the statute of Michigan that "in law, marriage is considered a civil contract to which the consent of parties capable of contracting is essential."

In the case of the University of Michigan v. McGuckin, the Supreme Court of Nebraska say:—"The main purpose of this definition is, we think, to negative the idea that marriage is an ecclesiastical sacrament, or that in the eye of the law it is controlled by the mandates or dogmas, or subject to the observance of the rituals or regulations, of any particular church or sect. That it is not a contract, resembling in any but the slightest degree, except as to the element of consent, any other contract with which the courts have to deal, is apparent upon a moment's reflection. This was pointed out by the late Mr. Justice Field, with his usual clearness of expression and wealth of illustration, in Maynard v. Hill, 125 U. S. 190; 31 L. Ed. 645. What persons establish by entering into matrimony is not a contractual relation, but a social status, and the only essential features of the transactions are that the participants are of legal capacity to assume that relation, and freely consent to do so."

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[18] In re Wells' Estate, 194 N. Y. 548.

[19] Eaton v. Eaton, 66 Neb. 676, 60 L. R. A. 608, 92 N. W. 995.

[20] Fenton v. Reed, 4 Johns. 52; Blanchard v. Lambert, 43 Iowa 229; University of Michigan v. McGuckin, 62 Neb. 489, 57 L. R. A. 917, 87 N. W. 180.

[21] Camden v. Belgrade, 75 Me. 126; Northfield v. Plymouth, 20 Vt. 582; Blanchard v. Lambert, 43 Iowa 228, 22 Am. Rep. 245.

The statute of Michigan declares marriage to be a civil contract for a certain purpose, that is, "so far as its validity is concerned," but it is only when the actual fact of marriage is accomplished, by persons against both of whom no legal impediment exists, that the statute steps in and declares what their rights, obligations and duties are, and places such rights, obligations, and duties beyond the power of the parties to change or modify.

But there are certain marriage contracts which are not absolutely void, and which may be abrogated, or the status of the parties be changed, by the act of one or both of the contracting parties.

The statute of Michigan recognizes certain marriages as voidable and not absolutely void.

## §75. Voidable Marriages.

Marriages solemnized when either of the parties is under the legal age of consent are not absolutely void, but only voidable. If the parties separate during such non-age and do not cohabit together afterward, the marriage is deemed void, without any decree of divorce or other legal process.[22] In such case it seems that the marriage contract is annulled and the marriage relation dissolved by the acts of the parties.

## §76. Who May Annul Voidable Marriages.

At common law the right to annul the marriage, where one of the parties was under the age of consent, continued with one party as long as it did with the other,[23] but the common law rule has been abrogated in this state.[24]

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[22] C. L. '15, (11393); Howell, 2nd. Ed. §11454.

[23] Reeves' Domestic Relations, §200.

[24] People v. Slack, 15 Mich. 193; C. L. '15, (11422); Howell, 2nd. Ed. §11483.

In case the consent of one of the parties to the marriage was obtained by force or fraud, the marriage is only voidable and not absolutely void.[25] In case of a marriage while one of the parties is under the legal age of consent, such marriage is voidable at the option of the minor. During the existence of the legal impediment the parties may separate by mutual agreement, and if they do so, and do not afterwards cohabit as husband and wife, the marriage will be void without a decree of divorce or other legal proceedings. In other words, in such case the marriage may be annulled by the mutual consent of both, or at the election of the party under age, but not at the election of the party of competent age.[26] But such marriage will be void if the party under age withdraws and refuses to cohabit.[27]

## §77. Who May Annul Marriage for Fraud or Duress.

Where the consent of one of the parties was secured by fraud the marriage can be annulled only on the application of the party defrauded. And where consent to a marriage is obtained by duress it can be nullified only on the application of the party upon whom the duress operated.[28]

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[25] C. L. '15, (11393); Howell, 2nd. Ed. §11454.

[26] C. L. '15, (11422); Howell, 2nd. Ed. §11483; People v. Slack, 15 Mich. 201; but such marriage will be void if the party under age withdraws and refuses to cohabit, People v. Bennett, 39 Mich. 209.

[27] People v. Slack, 15 Mich. 193; People v. Schoonmaker, 119 Mich. 245, 77 N. W. 246.

[28] Smith v. Smith, 51 Mich. 607, 17 N. W. 76; Sissung v. Sissung, 65 Mich. 168, 31 N. W. 770; Gillett v. Gillett, 78 Mich. 184, 43 N. W. 110; Nadra v. Nadra, 79 Mich. 591, 44 N. W. 1046; Harrison v. Harrison, 94 Mich. 561, 54 N. W. 275, 34 Am. St. Rep. 364.

# PART TWO

# RIGHTS, DUTIES AND OBLIGATIONS OF HUSBAND AND WIFE

## PART TWO—RIGHTS, DUTIES AND OBLIGATIONS OF HUSBAND AND WIFE

Chapter VIII. Statutory Provisions.
Chapter IX. Property Rights of Husband and Wife.
Chapter X. Curtesy, Dower and Assignments.
Chapter XI. Barring Dower and Election.
Chapter XII. Rights, Duties and Obligations of Dowress.
Chapter XIII. Barring Dower of Insane Persons and Minors.

# CHAPTER VIII.

## STATUTORY PROVISIONS.

§78. Introduction.
§79. Mutual Property Rights of Husband and Wife.
§80. Married Women's Act.
§81. Trustee for Married Woman May Convey to Her.
§82. Actions by and against Married Women.
§83. Husband not Liable for Wife's Contract in Relation to her Separate Property.
§84. Antenuptial Contracts.
§85. Wife May Insure Life of Husband.
§86. Right of Married Woman to Earnings.

### §78. Introduction.

By the common law of England husband and wife were but one person in general legal contemplation.[1]

As long as the common law rule regarding the unity of the marriage relation existed, unmodified by statute, the mutual rights, duties and obligations of husband and wife were determined by the common law. The rights appeared to be all with the strong—the man; the duties to the weak—the woman.

The legal relation of husband and wife, both in this country and in England, has been practically revolutionized by modern legislative enactment. Great changes have been made in England, in the colonies of the British Empire, and in all of the states of the Union, not only in regard to the unity of the marriage relation, but also the right of a married woman to acquire, enjoy and dispose of her separate property the same as though she were unmarried. In England the married women's act absolutely secures to a wife her separate property. The different provinces of Canada have different rules and regulations on the subject, and in the United States there is no state where all of the rigorous rules of the common law as to the wife's property are in force. Many of the common law disabilities of a married woman have been removed, which formerly existed by unity of the marriage relation or, as is sometimes said, merger of identity. Great changes have also been made with reference to the wife's earnings, her contractural powers, and the general control of her separate property. So great is the variance of these statutes in the different jurisdictions that considerable confusion in our laws is produced.

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[1] Snyder v. People, 26 Mich. 106, 12 Am. R. 302.

The object and scope of this work will not permit or require a general discussion of the common law relating to the mutual rights, duties and obligations of husband and wife. This chapter will necessarily be confined, to a considerable extent, to the general provisions of the Michigan legislation on that subject with references to the common law rules which still exist unmodified by statute.

### §79. Mutual Property Rights of Husband and Wife.

At common law all the wife's property and choses in action, if reduced to possession during the coverture, belonged to the husband, but on his death, before recovery by him, choses in action belonging to the wife before marriage survived to her.[2]

This common law rule has been changed in Michigan by both constitutional and statutory provisions. The present constitution provides that "the real and personal estate of every woman, acquired before marriage, and all property to which she may afterwards become entitled by gift, grant, inheritance or devise, shall be and remain the estate and property of such woman, and shall not be liable for the debts, obligations or engagements of her husband, and may be devised or bequeathed by her as if she were unmarried."[3]

The same provision appears in the constitution of 1850, with the exception that the word "female," as used in the constitution of 1850, is changed to "woman" in the constitution of 1908.[4]

### §80. Married Women's Act.

In 1855, pursuant to the provisions of the constitution of 1850, the legislature passed an act entitled: "An Act Relative to the Rights of Married Women," providing that "the real and personal estate of every female acquired before marriage, and all property, real and personal, to which she may afterwards become entitled, by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her in the same manner and with the like effect as if she were unmarried."[5]

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[2] Berger v. Jacobs, 21 Mich. 215.

[3] Const. 1908, Article XVI, Sec. 18.

[4] Const. 1850, Art. XVI, Sec. 5.

This statute was the first provision of law in Michigan which in terms gave to a married woman complete and independent control over her own property.[6]

## §81. Trustee for Married Woman May Convey to Her.

Section 2 of the act of 1855 provides that "Any person who may hold, or who may hereafter hold as trustee for any married woman any real or personal estate or other property, under any deed of conveyance or otherwise, may convey to such married woman, by deed or otherwise, all or any portion of such property, or the rents, issues and profits thereof, for her sole and separate use and benefit."[7]

## §82. Actions by and against Married Women.

The third section of the act of 1855 provides that "actions may be brought by and against a married woman in relation to her sole property in the same manner as if she were unmarried; and in cases where the property of the husband cannot be sold, mortgaged or otherwise encumbered, without the consent of his wife, to be given in the manner prescribed by law, or where his property is exempted by law from sale on execution or other final process issued from any court against him, his wife may bring an action in her own name with the like effect as in cases of actions in relation to her sole property as aforesaid."[8]

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[5] Act 168, Pub. Acts 1855; C. L. '15, (11485); Howell, 2nd. Ed., §11545.

[6] Ransom v. Ransom, 30 Mich. 328.

[7] Act. No. 168, P. A. 1855, Sec. 2; C. L. '15, (11486); Howell, 2nd. Ed., §11546; Burdeno v. Amperse, 14 Mich. 97; Tillman v. Shackleton, 15 Mich. 453.

[8] C. L. '15, (12356); Howell, 2nd. Ed., §11547; Wilson v. Coolidge, 42 Mich. 112, 3 N. W. 285; Hunt v. Eaton, 55 Mich. 369, 21 N. W. 429; King v. Merritt, 67 Mich. 194, 34 N. W. 689.

Actions in relation to the wife's separate interest should be fought by her alone, and not jointly with her husband, M. C. R. R. Co. v. Coleman, 28 Mich. 440.

In an action against a married woman for slander, her husband cannot be made liable for her tort, so there can be no reason for joining him as a defendant, yet the statutes seem to assume that he is still a proper party, and, whether a necessary one or not, he is at least not an improper party—Burt v. McBain, 29 Mich. 260.

## §83. Husband not Liable for Wife's Contract in Relation to her Separate Property.

Section Four of the Married Women's Act of 1855 provides that "the husband of any married woman shall not be liable to be sued upon any contract made by such married woman in relation to her sole property, and the wife shall be liable to be sued upon any contract or engagement made by her in cases where the husband is not in law liable, or where he refuses to perform such contract or engagement, and in any case herein authorized, the cause of action shall be deemed to have accrued from and after the passage of this act."[9]

## §84. Antenuptial Contracts.

The act of 1855 also provides that "all contracts made between persons in contemplation of marriage shall remain in full force after marriage takes place."[10]

The fact that another statute provides a method of barring dower by jointure does not deprive the intended wife, who is a party to an antenuptial contract, of the power to bar her dower or other statutory rights, by any other valid form of antenuptial contracts.[11]

While the law prescribes the rights of husband and wife in

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[9] Act No. 168, P. A. 1855, Sec. 4; C. L. '15, (11487); Howell, 2nd. Ed., §11548.

This statute abrogates the common law making the husband liable for his wife's antenuptial contracts—Smith v. Martin, 124 Mich. 34, 82 N. W. 662.

It is not going out of the way to regard a husband who deserts his family and does nothing for their support as refusing to perform his wife's contract for necessaries. Carstens v. Hanselman, 61 Mich. 426, 28 N. W. 159.

But it is not necessary to show, in order to maintain an action against a married woman for family necessaries which she has bought and agreed to pay for, that the husband refused to do so. Meads v. Martin, 84 Mich. 306, 47 N. W. 583; Hirschfield v. Waldron, 83 Mich. 116, 47 N. W. 239; Commercial Bank v. Newton, 117 Mich. 433; 75 N. W. 934.

The fact that goods were charged upon the plaintiff's book to the wife would not necessarily estop him to claim that the goods were sold upon the credit of the husband. Larson v. Jensen, 53 Mich. 427, 19 N. W. 130; Leonard v. Stowe, 166 Mich. 681, 132 N. W. 681; Taylor-Woolfenden v. Atkinson, 127 Mich. 633, 87 N. W. 84.

[10] Act No. 168, Sec. 5; P. A. 1855, C. L. '15, (11488); Howell, 2nd. Ed., §11549.

[11] Hockenberry v. Donovan, 170 Mich. 379, 136 N. W. 389; Barth v. Lines, 118 Ill. 374, 7 N. E. 679, 59 Am. R. 374; Desnoyer v Jordan, 27 Minn. 295, 7 N. W. 140.

The mutual covenants of the parties to an antenuptial agreement to waive their rights in the

the property of each other, they may nevertheless determine for themselves, by antenuptial contracts, what rights they respectively may have in their own and each other's property during the marriage, and what shall become of such property afterwards. Such contracts are not against public policy, and when executed by competent parties without fraud or duress, and with full knowledge of all material facts, will be enforced by the courts.[12]

## §85. Wife May Insure Life of Husband.

The statute of Michigan authorizes any married woman to insure the life of her husband or any other person for her sole use in any life insurance company of any nature whatever, located in any of the United States or in Great Britain, for any definite period, or for the term of his natural life; and in case she survives her husband or such other person insured in her behalf, the amount of such policy due and payable is payable to her to and for her own use, free from the claims of the representatives of her husband or other person insured, or of any of his creditors, but such exemption will not apply where the amount of premium annually paid exceeds the sum of three hundred dollars.[13] Such insurance policy may contain a provision that in case she dies first the insurance shall be paid to their children or to their guardian if under age.[14] And in case of the death of such wife before the death of her husband or such other person insured, the amount of the policy may be disposed of by her last will and testament.[15]

## §86. Right of Married Woman to Earnings.

At common law, and until quite recently in Michigan, the earnings of a married woman belonged to her husband unless he had emancipated her. The wife's time, services and earnings belonged to the husband.[16]

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property of each other, and the release of such rights, constitute a good consideration to support the agreement, and the marriage of the parties is of itself a sufficient consideration. Kroll v. Kroll, 219 Ill. 105, 4 Am. & Eng. Ann. Cases 801, 76 N. E. 63.

[12] Hockenberry v. Donovan, 170 Mich. 370, 136 N. W. 389; Kroll v. Kroll, 4 Am. & Eng. Ann. Cases 801.

[13] C. L. '15, (11489); Howell, 2nd. Ed. §11550.

[14] Insurance Co. v. Wayne County Savings Bank, 68 Mich. 116, 39 N. W. 853.

[15] C. L. '15, (11490); Howell, 2nd. Ed., §11551; Insurance Co. v. Wayne County Savings Bank, 68 Mich. 116.

[16] Glover v. Alcott, 11 Mich. 470; Tong v. Marvin, 15 Mich. 60.

In 1911, however, the legislature enacted that "each and every married woman in the State of Michigan shall be absolutely entitled to have, hold, own, retain and enjoy, any and all earnings acquired by any such married woman as the result of her personal effort; and to sell or otherwise dispose of any and all such earnings, and to make contracts in relation thereto to the same extent that any such married woman could have or do if unmarried."[17]

This act does not in terms permit a married woman to leave her husband without cause and engage her services to some other person.

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[17] Mich. C. L. 1915, (11478); Howell, 2nd. Ed., §11552. Damages for the loss of services of plaintiff's wife arising from personal injuries suffered by her caused by the negligence of defendant's servant, are recoverable in an action by the husband, notwithstanding the provisions of Act No. 196, P. A. 1911, giving the wife the right to her earnings and services. That statute contemplates and means that all earnings acquired, or services performed as a result of her personal effort, in any separate business carried on by her in her own behalf, or any services performed by her for others than her husband, belonged to her. Her labor, companionship, society and assistance in the discharge of her family and household duties and obligations still belong to the husband. Gregory v. Oakland Motor Car Co., 181 Mich. 101.

# CHAPTER IX.

## PROPERTY RIGHTS OF HUSBAND AND WIFE.

**§87. Mutual Property Rights.**
**§88. Deed of Land Owned by Wife.**
**§89. Land Held Jointly by Husband and Wife.**
**§90. Same Subject Continued.**
**§91. Doctrine of Survivorship Does not Apply to Personal Property.**
**§92. Same Subject Continued.**
**§93. Effect of Divorce on Title to Land Held by Husband and Wife.**

### §87. Mutual Property Rights.

There is no legal presumption that a wife has no separate property.[1] Under the married woman's act of 1855 the wife's property is not simply to be and remain hers during her life time, but the husband's common law interest is excluded altogether even after her death, and the husband has no right of control over his wife's property during coverture.[2]

Damages recovered by a wife for injuries to her person and for pain and suffering resulting from an assault and battery committed upon herself belong to her as a part of her separate property.[3]

A wife may acquire property redeemed by judgment creditors from execution sale against her husband, and in such case the property so acquired by her will be treated as her separate property and the husband will have no interest therein.[4]

A husband cannot encumber his wife's property without her consent; and the mere fact that he has given a chattel mortgage on personal property belonging to her does not tend to show that he owns it, if there is no evidence of the wife's consent.[5]

### §88. Deed of Land Owned by Wife.

Prior to the passage of the married woman's act of 1855 the sole deed of a married woman was void.[6] This rule of the common law was changed by the act of 1855, and since that act took effect a married woman may convey her land alone by deed executed and acknowledged by her in the same manner and with the like effect as if she were unmarried.[7] And a wife may mortgage her sole property to secure her husband's debts.[8]

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[1] Ross v. Ross, 47 Mich. 185, 10 N. W. 193.

[2] Tong v. Marvin, 15 Mich. 60; White v. Zane, 10 Mich. 333; Insurance Co. v. Montague, 38 Mich. 548.

[3] Berger v. Jacobs, 21 Mich. 215.

[4] Taylor v. Boardman, 24 Mich. 287.

[5] Harvey v. Galloway, 48 Mich. 531, 12 N. W. 689; Gavigan v. Scott, 51 Mich. 373, 16 N. W. 769.

A husband and wife may convey directly to each other without the intervention of a trustee or third person, as was required prior to the act of 1855.[9]

A wife who contributes of her own means to the purchase of land by her husband, who takes a deed in his own name—she not insisting upon any agreement for repayment or the conveyance of any interest in the land to her—will be presumed conclusively, after her husband's death, to have intended the amount of her contribution as a gift to her husband.[10]

## §89. Land Held Jointly by Husband and Wife.

The statute provides "that all grants and devises of land made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy."[11] One of the exceptions mentioned in the following section is a grant or devise to husband and wife.[12]

Whatever would defeat a husband's title under a grant made to himself and his wife jointly, would defeat hers also, as they take by entireties.[13] Where a grant or devise of land is made in fee to husband and wife, on the death of one of them the whole title inures to the survivor. Nothing in our constitution or statutes relating to the rights of married women would convert such an estate into a tenancy in common.[14] Where land is conveyed or devised to husband and wife, they hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritable interest. Neither can be said to have an undivided half, nor can either, without joining in a conveyance with the other, sell or incumber the same or his or her interest therein.[15]

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[6] Goff v. Thompson, Har. Ch. 60.

[7] Farr v. Sherman, 11 Mich. 33; Watson v. Thurber, 11 Mich. 457.

[8] Watson v. Thurber, 11 Mich. 469.

[9] Burdeno v. Amperse, 14 Mich. 91; Ransom v. Ransom, 30 Mich. 328.

[10] Campbell v. Campbell, 21 Mich. 438.

[11] C. L. '15, (11562); Howell, 2nd. Ed., §10667.

[12] C. L. '15, (11563); Howell, 2nd. Ed., §10667.

[13] Manwaring v. Powell, 40 Mich. 371.

[14] Fisher v. Provin, 25 Mich. 347; Insurance Co. v. Resh, 40 Mich. 241; Jacobs v. Miller, 50 Mich. 119, 15 N. W. 42; Bassett v. Budlong, 77 Mich. 338, 43 N. W. 984.

A deed executed to a man and woman who at the time of the execution and delivery of the deed are in fact husband and wife, creates an estate which, on the death of one of the grantees, will pass to the survivor, and the fact of the relationship may be shown by parol testimony.[16]

### §90. Same Subject Continued.

This species of tenancy grows out of the unity of husband and wife, and is unlike that of joint tenants, who are each seized of an undivided moiety. The husband and wife are each seized of the whole, and not of an undivided moiety.[17]

The doctrine of estates by entireties has frequently been combated in this state, and the case of Dowling v. Salliott, 83 Mich. 131, seems to have overthrown it. In that case it is stated in the opinion written by Mr. Justice Cahill that "strictly speaking, estates in entirety were abolished by the statute of 1846, C. L. '97 Sec. 8825; Howell 2nd Ed. Sec. 10665," which reads as follows: Estates, in regard to the number and connection of their owners, are divided into estates in severalty, in joint tenancy, and in common; the nature and properties of which respectively shall continue to be such as are now established by law except so far as the same may be modified by this chapter.

But in the later case of Lewis' Appeal, 85 Mich. 340, the case of Dowling v. Salliott was overruled so far as it declares that the estate of the wife when held jointly with her husband is one of joint tenancy.[18]

In the Lewis case the court held that in the case of Dowling v. Salliott a correct result was reached by the court, and repudiated that decision only so far as it held that an estate held by husband and wife jointly was an estate in joint tenancy.

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[15] Insurance Co. v. Resh, 40 Mich. 241; Allen v. Allen, 47 Mich. 74, 10 N. W. 113.

[16] Dowling v. Salliott, 83 Mich. 131, 47 N. W. 225; Auditor General v. Fisher, 84 Mich. 132, 47 N. W. 574.

[17] Dickey v. Converse, 117 Mich. 455, 76 N. W. 80; Hardenberg v. Hardenberg, 10 N. J. Law 42, 18 Am. Dec. 378.

[18] Lewis App., 85 Mich. 340, 48 N. W. 580.

### §91. Doctrine of Survivorship Does not Apply to Personal Property.

The doctrine of survivorship does not extend to personal property and securities owned by husband and wife jointly and held in the name of both.[19]

There are some cases which seem to conflict with the above rule, but in those cases the decision was put upon the ground that it was apparent from the character of the transaction that the husband intended to give the property to his wife in the event of her survivorship, and hence the transaction possessed all the essential qualities of a gift *causa mortis,* which he might revoke in his life time, and which would not take effect until his death, if not previously recalled.[20]

### §92. Same Subject Continued.

Nor does the doctrine of survivorship apply to a purchase money mortgage given to a husband and wife jointly on the sale of land owned by the husband.[21] The interest of a husband and wife in a land contract, however, by which they are to receive a deed of the land is not an interest in personal property, and, upon the death of the husband the entire interest passes to the wife by right of survivorship.[22]

### §93. Effect of Divorce on Title to Land Held by Husband and Wife.

The legislature of 1909 passed an act providing that where real estate is held by a husband and wife as joint tenants or tenants by entirety, upon their being divorced, they shall become tenants in common of such real estate, unless the ownership thereof is otherwise determined by the decree of divorce.[23]

It is not competent for the court, in fixing the amount of alimony, to diminish the estate owned by the wife as tenant by entireties with the husband.[24]

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[19] Wait v. Bovee, 35 Mich. 425; Luttermoser v. Zeuner, 110 Mich. 186, 68 N. W. 117.

[20] State Bank of Croswell v. Johnson, 151 Mich. 584, 115 N. W. 464; In the matter of Albrecht, 136 N. Y. 91, 18 L. R. A. 329.

[21] McLeod v. Free, 96 Mich. 57, 55 N. W. 685; Wait v. Bovee, 35 Mich. 425.

[22] Bowen v. Lansing, 129 Mich. 117, 18 N. W. 384; Comfort v. Robinson, 155 Mich. 143, 118 N. W. 943.

[23] C. L. 1915, (11436); Howell, 2nd. Ed., §11497.

[24] Delor v. Delor, 159 Mich. 628, 124 N. W. 544; Brown v. Brown, 144 Mich. 654, 108 N. W. 890.

# CHAPTER X.

## CURTESY, DOWER AND ASSIGNMENTS.

§94. Husband's Rights in Land of Deceased Wife.
§95. Dower.
§96. Dower in Case of Lands Exchanged.
§97. Right of Alien or Non-Resident to Dower.
§98. Dower in Land Mortgaged.
§99. Widow's Interest in Surplus after Sale on Mortgage Foreclosure.
§100. Dower when Heir Pays the Mortgage.
§101. Estimating Dower in Land Aliened by Husband.
§102. Dower May be Assigned by Probate Court—When.
§103. How Dower Assigned by Probate Court.
§104. Proceedings and Commissioner's Oath.
§105. Dower in Land not Severable.
§106. Widow may Occupy with Heirs if they do not Object.

### 94. Husband's Rights in Land of Deceased Wife.

At common law a husband had a prospective interest in land owned by his wife, and at her death he became entitled, under certain conditions, to the use of her land during his life. This right of the husband was called tenancy by the curtesy.

At common law four requisites were necessary to create such a tenancy, viz: first, marriage; second, seisin by the wife; third, issue, and fourth, death of the wife.[1] The common law estate by the curtsey has been abolished in Michigan,[2] but there still remains on the statute books an abrogated law enacted many years ago which purports to give to a husband an interest in the land of his deceased wife which in some particulars resembles the common law tenancy by the curtesy. That law provides that "when any man and his wife shall be seized in her right of an estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life as tenant thereof by the curtesy: Provided, That if the wife at her death shall leave issue by any former husband, to whom the estate might descend, such issue shall take the same, discharged from the right of the surviving husband to hold the same as tenant by the curtesy."[3]

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[1] Sec. Blk. Com. 127; 1 Coke upon Littleton 643; Hathon v. Lyon, 2 Mich. 95.

[2] Tong v. Marvin, 15 Mich. 60; Hill v. Chambers, 30 Mich. 422.

The common law estate by the curtesy no longer exists under Michigan laws now in force, and the statutory estate provided for in the statute above quoted was quite different from that at the common law. Even this was abrogated by the married women's act of 1855,[4] except where it had vested prior to that act.[5]

## §95. Dower.

By the statutes of Michigan the widow of every deceased person is entitled to dower, which consists of the use, during her natural life, of one-third part of all the land whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she has been lawfully barred thereof.[6]

## §96. Dower in Case of Lands Exchanged.

If a married man, seized of an estate of inheritance in land, exchanges the same for other land, his wife not signing the conveyance, his widow is not entitled to dower in both, but may elect to be endowed of the land given or that taken in exchange. If she does not manifest her election by proceedings to recover her dower within one year after her husband's death, she is deemed to have elected to take her dower of the land received in exchange.[7]

The right of dower is not an undivided third of the entirety, but of one-third in severalty; nor is it one-third in quantity of the land of which a husband died seized, but the use of such part as will yield one-third of the income of the whole.[8] Until it is legally and duly assigned, it is a right vesting in action only. It is a mere right of action and nothing more.[9]

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[3] R. S. 1846, Page 340, Sec. 25; C. L. '97, §8955; Howell, 2nd. Ed., §10948; omitted in C. L. '15.

[4] Tong v. Marvin, 15 Mich. 60, 69.

[5] Hill v. Chambers, 30 Mich. 422; Brown v. Clark, 44 Mich. 309, 6 N. W. 679.

[6] C. L. '15, (11654); Howell, 2nd. Ed., §10910.

The dower interest of a widow is no part of the estate of her deceased husband, and it cannot be sold by his administrator; nor is the administrator authorized to purchase a release of such interest for the benefit of the estate. Needham v. Belote, 39 Mich. 487.

[7] C. L. '15, (11655); Howell, 2nd. Ed., §10911.

[8] Leonard v. Leonard, 4 Mass. 533; King v. Merritt, 67 Mich. 216 34 N. W. 689; Conner v. Shepherd, 15 Mass. 167.

[9] Rayner v. Lee, 20 Mich. 384; Galbraith v. Fleming, 60 Mich. 412, 27 N. W. 581.

Unassigned dower, being but a right in action, is not a bar to recovery in ejectment by the owner of the fee.[10]

## §97. Right of Alien or Non-Resident to Dower.

It is provided by statute that the fact that a woman is an alien or non-resident of the state does not on that account bar her right of dower in land lying in this state, of which her husband died seized, and her dower may be assigned to her, or recovered by her, in the same manner as if she and her deceased husband had been residents of this state at the time of his death.[11] In the revised statutes of 1846 this section does not contain the words: "of which the husband died seized."

The statute negatives the right to dower of a widow residing out of the state at the time of her husband's death, except in lands of which he died seized. The non-residence mentioned refers to the time of the husband's death.[12]

## §98. Dower in Land Mortgaged.

When a man is seized of an estate of inheritance in lands and shall have executed a mortgage on such estate before marriage, his widow is entitled to dower out of the mortgaged land as against every person except the mortgagee and those that hold under him.[13]

Dower is not required to be set off under the laws of Michigan before bringing ejectment therefor by the widow.[14]

The statutory action of ejectment is available to no one but the widow prior to the assignment of her dower. Her assignee cannot bring such action before assignment; but after such assignment it becomes transferable the same as any other life estate.[15]

A widow's dower in an encumbered estate is liable to contribute to pay its proportion of the interest accruing on the encumbrance.[16]

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[10] McCammon v. D. L. & N. R. R. Co., 66 Mich. 442, 33 N. W. 728; King v. Merritt, 67 Mich. 216, 34 N. W. 689.

[11] C. L. '15, (11670); Howell, 2nd. Ed., §10930.

[12] Pratt v. Tefft, 14 Mich. 191, 200.

[13] C. L. '15, (11656); Howell, 2nd. Ed., §10912; Hall v. Marshall, 139 Mich. 123, 102 N. W. 625; Campbell v. Campbell, 21 Mich. 438; Burrall v. Bender, 61 Mich. 608, 28 N. W. 731; Bowles v. Hoard, 71 Mich. 150, 39 N. W. 24.

[14] Burrall v. Bender, 61 Mich. 608, 28 N. W. 371.

[15] Galbraith v. Fleming, 60 Mich. 408, 27 N. W. 581.

[16] Campbell v. Campbell, 21 Mich. 438.

### §99. Widow's Interest in Surplus after Sale on Mortgage Foreclosure.

Whenever, in case of a mortgage given by the husband before marriage, or to secure purchase money of land mortgaged, or in case of a mortgage where the wife shall have joined with her husband, the mortgagee, or those claiming under him, shall, after the death of the husband, cause the mortgaged premises to be sold by virtue of such mortgage, and any surplus shall remain after the payment of the amount due on the mortgage and the cost and charges of the sale, the widow of the mortgagor is entitled to the interest or income of one-third of such surplus for her life as dower.[20]

### §100. Dower when Heir Pays the Mortgage.

In either of the cases mentioned in the foregoing section, if the heir pays and satisfies the mortgage, the amount so paid should be deducted from the value of the land, and, after such deduction, the widow is entitled to have set out to her for her dower in the mortgaged land, the value of one-third of the residue.[21]

### §101. Estimating Dower in Land Aliened by Husband.

When a widow becomes entitled to dower in land which the husband has aliened in his life time, and such land shall have been enhanced in value after the alienation, such land must be estimated, in setting out the widow's dower, according to its value at the time of its alienation.[22]

A proceeding to which a wife was not a party will not cut off her right of dower. A sale under a decree in partition proceedings, to which the husband is a party and the wife is not, will not bar her right of dower.[23]

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17. C. L. '15, (11657); Howell, 2nd. Ed., §10913.

18. Baker v. Pierson, 5 Mich. 456; Crippen v. Morrison, 13 Mich. 23; Ladue v. D. & M. R. R. Co., 13 Mich. 280; Caruthers v. Humphrey, 12 Mich. 270.

19. Newton v. Sly, 15 Mich. 396.

20. C. L. '15, (11658); Howell, 2nd. Ed., §10914; Burrall v. Bender, 61 Mich. 619, 28 N. W. 731; Bowles v. Hoard, 71 Mich. 150, 39 N. W. 24; Hall v. Marshall, 139 Mich. 123, 102 N. W. 658.

21. C. L. '15, (11659); Howell, 2nd. Ed., §10915; Bemis v. Conley, 49 Mich. 392, 13 N. W. 789; Burrall v. Bender, 61 Mich. 608, 28 N. W. 731; Bowles v. Hoard, 71 Mich. 150, 39 N. W. 24; Snyder v. Snyder, 6 Mich. 470.

22. C. L. '15, (11660); Howell, 2nd. Ed., §10916.

23. Greiner v. Klein, 28 Mich. 12 (Campbell J. dissenting).

## *Assignment of Dower*

### §102. Dower May be Assigned by Probate Court—When.

When the widow's claim of dower is admitted, or is not disputed by the heirs, devisees, or persons claiming under them or either of them, it may be assigned to her, in whatever counties the land may lie, by the judge of probate for the county in which the estate of the husband is settled, upon the application of the widow or any other person interested in the land, notice of which application must be given to all persons interested, in such manner as the judge of probate shall direct.[24]

### §103. How Dower Assigned by Probate Court.

When the widow's right to dower is admitted by the heirs or those holding under them, and an application is made to the probate court to have this dower assigned, the judge of probate is required to issue his warrant for that purpose to three discreet and disinterested persons, authorizing and requiring them to set off the widow's dower by metes and bounds when it can be done without injury to the whole estate.[25]

In an application to the judge of probate for the assignment of dower, it is advisable that notice of the application be given to the administrator, if administration of the estate has not been closed, but it is not necessary in all cases.[26]

The revised statutes of 1838 regarded the assignment of dower as a matter entirely between the widow and the heir or other tenants of the land, and while the statutes in regard to the assignment of dower have been somewhat modified, it is generally understood that the rule announced in the previous paragraph is still the law of this state. In the case of an insolvent estate, where it becomes necessary to sell the whole land subject to the widow's dower, the administrator should be notified of the application, and in all cases such notice should also be given to the heirs, or those claiming under them.[27]

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[24] C. L. '15, (13942); Howell, 2nd. Ed., §10917; Dower may be assigned in land subject to the widow's homestead right. Under the Michigan statutes the widow's right of dower and her homestead rights are not so far inconsistent with each other that a claim of one is a bar to the other. Dower is an estate for life and may continue after the homestead right has ceased. It is also the subject of alienation, while the homestead interest can only be released to the owner of the fee. Showers v. Robinson, 43 Mich. 511, 5 N. W. 988; Dei v. Habel, 41 Mich. 88, 1 N. W. 964.

[25] C. L. '15, (13943); Howell, 2nd. Ed., §10918.

[26] Campbell's Appeal, 2 Doug. (Mich.) 140.

A widow's dower may be assigned at any time, either before or after administration. She is under no necessity or obligation to await the administration proceedings to have her dower assigned.[28]

Where the widow is compelled to resort to equity to obtain her dower and her share in the estate of her husband, the court will retain jurisdiction for the purpose of disposing of the whole question of dower, *mesne* profits and distribution, and where a bill in equity is filed to determine the right of dower, partition and assignment may be made in the same suit.[29]

## §104. Proceedings and Commissioner's Oath.

Commissioners appointed by the probate court to set off dower must be sworn to the faithful discharge of their duties, and they are required as soon as may be to set off the dower according to the command of their warrant, and to make to the probate court a return in writing of their doings, with an account of their charges and expenses, and if such report is accepted, confirmed and recorded, and a certified copy thereof recorded in the office of the register of deeds of the county where the land is situated, the dower remains fixed and certain unless such confirmation is set aside or reversed on appeal. One half of the costs of the proceedings is required to be paid by the widow and the other half by the adverse party.[30]

In partition proceedings between the widow and the heirs where the widow has both dower and homestead rights, the assignment of dower should be in the homestead land if possible.[31]

## §105. Dower in Land not Severable.

When the estate out of which dower is to be assigned consists of a mill or other tenement which cannot be divided without damage to the whole, and in all cases where the estate cannot be divided by metes and bounds, the widow's dower may be assigned out of the rents, issues and profits thereof, to be had and received by her as a tenant in common with the other owners of the estate.[32]

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[27] King v. Merritt, 67 Mich. 194, 34 N. W. 689.

[28] White v. Spaulding, 50 Mich. 26, 14 N. W. 684; King v. Merritt, 67 Mich. 194, 34 N. W. 689.

[29] Miller v. Stepper, 32 Mich. 194, 203; Brown v. Bronson, 35 Mich. 415, 419.

[30] C. L. '15, (13944); Howell, 2nd. Ed., §10919.

[31] Robinson v. Baker, 47 Mich. 619, 11 N. W. 410.

## §106. Widow may Occupy with Heirs if they do not Object.

By statute a widow entitled to dower may continue to occupy the land with the children or other heirs of her deceased husband, or may receive one third part of the rents, issues and profits thereof, without having her dower assigned, so long as the heirs or others interested in the land do not object.[33]

Under this section of the statute, a widow has a right to occupy the premises in which she is entitled to dower, with the children or other heirs of her deceased husband, until some steps are taken to assign her dower or to partition the estate,[34] and such occupancy by the widow is not adverse to the remaindermen.[35]

A wife who, after the death of her husband, continues by common consent to occupy the homestead without assignment of dower, the children remaining with her as long as they choose and returning home at pleasure, holds the premises, not as a life tenant, but as a tenant in common with the children. Under such circumstances the widow cannot be charged with rent, nor will she be permitted to charge the estate for taxes paid by her.[36]

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[32] C. L. '15, (13945); Howell, 2nd. Ed. §10920.

[33] C. L. '15, (11661); Howell, 2nd. Ed., §10921.

[34] Zoellner v. Zoellner, 53 Mich. 627, 19 N. W. 556; Benedict v. Burman, 90 Mich. 402, 51 N. W. 461.

[35] Lumley v. Haggerty, 110 Mich. 552, 68 N. W. 243.

[36] In Re Graff's Estate, 123 Mich. 56, 82 N. W. 248.

# CHAPTER XI.

## BARRING DOWER AND ELECTION.

§107. Methods of Barring Dower by Wife or Widow.
§108. Dower Barred by Antenuptial Jointure.
§109. How Assent Expressed.
§110. Antenuptial Settlement.
§111. Election in Case of Jointure or Pecuniary Provisions.
§112. Election in Case of Provision by Will of Husband.
§113. Election.—What Constitutes.
§114. New Assignment if Widow Lawfully Evicted.
§115. Rights of Dower of Non-Residents and Aliens.

### §107. Methods of Barring Dower by Wife or Widow.

It is provided by statute that "a married woman residing in this state may bar her right of dower in any estate conveyed by her husband, or his guardian, if he be under guardianship, by joining in the deed of conveyance and acknowledging the same, or by joining with her husband in a subsequent deed acknowledged in like manner, or by deed executed by the wife alone to one who has theretofore acquired and then holds the husband's title, provided the intent to bar her right of dower shall be expressed in said deed."[1]

A wife's parol agreement to release her right of dower is not valid, nor will a covenant by a widow against her own act in a deed given by her as administratrix, in her representative capacity, of land belonging to her deceased husband, bar or estop her from claiming dower therein.[2]

This section contemplates that a married woman can bar her dower by joining in a deed with her husband, and acknowledging the same in the manner required by law. A deed not acknowledged by her will not bar her right of dower even although she may have signed the same.[3]

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[1] C. L. '15, (11679), (12725-30); Howell, 2nd. Ed., §10922.

[2] Wright v. DeGroff, 14 Mich. 164; Hayes v. Livingston, 34 Mich. 392. While non-resident wives are not entitled to dower in lands in this state which have been conveyed by the husband while a non-resident, (Ligare v. Semple, 32 Mich. 449), in cases free from fraud, still, when the purchase and sale of land in this state by a non-resident husband is a part of a scheme to perpetrate a fraud upon the wife for the purpose of depriving her of dower, the principles laid down in Legare v. Semple have no application—Bear v. Stahl, 61 Mich. 215, 28 N. W. 69.

A release of dower procured by fraud, undue influence, or for an insufficient consideration, will be set aside.[4]

It is not the policy of the law to favor the separation of husband and wife with or without divorce, and a contract between husband and wife providing for a separation, or which is liable to favor one which has not yet taken place, will not be sustained. But where a separation has actually taken place, or where the husband and wife have fully decided to separate, a release of dower to the husband will be sustained which does not spring from fraud or coercion, and which contemplates a suitable provision for the wife and children, if any, by an equitable division of the property.[5]

A husband, by will or otherwise, cannot bar his wife's right of dower, nor can she be divested of such right except by statute or her own voluntary act.[6] Nor will equity compel performance by her of her husband's agreement that she shall release her dower.[7]

The recovery of dower may be barred by the statute of limitations.[8]

Where, on a decree for separate maintenance, no provision is made for a division of the property, and the husband subsequently inherits land which he conveyed without the wife's signature, the widow is not barred of her dower interest in the land so conveyed.[9]

A valid tax title will cut off dower rights,[10] but such dower rights cannot be destroyed or cut off by proceedings in partition, to which the claimant is not a party,[11] nor by sale of land of the claimant's husband on execution against him.[12]

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[3] Maynard v. Davis, 127 Mich. 571, 578, 86 N. W. 1051. The method of barring dower by jointure as provided by C. L. '15, (11663), Howell, 2nd. Ed., §§10923, 10924, does not exclude or prohibit the method by antenuptial agreements adopted by the parties—Hockenberry v. Donovan, 170 Mich. 370, 136 N. W. 389.

[4] Miller v. Stepper, 32 Mich. 194.

[5] Randall v. Randall, 37 Mich. 563; Rhoades v. Davis, 51 Mich. 306, 311, 16 N. W. 659.

[6] Miller v. Stepper, 32 Mich. 198.

[7] Weed v. Terry, 2 Doug. (Mich.) 344, overruling on this point the same case reported in Walker's Chancery, 501; Richmond v. Robinson, 12 Mich. 193; Buchoz v. Walker, 19 Mich. 224; Ligare v. Semple, 32 Mich. 443.

[8] Butcher v. Butcher, 137 Mich. 392, 100 N. W. 604; Beebe v. Lyle, 73 Mich. 114, 40 N. W. 944.

[9] Killackey v. Killackey, 156 Mich. 127, 120 N. W. 680.

[10] Robbins v. Barron, 32 Mich. 39.

A dower right cannot be established in land, the deed of which to claimant's husband has never been recorded, where the title to the land has passed to subsequent purchasers in good faith.[13]

### §108. Dower Barred by Antenuptial Jointure.

"A woman may also be barred of her dower in all the land of her husband, by jointure settled on her with her assent before the marriage, provided such jointure consists of a freehold estate in the lands for the life of the wife at least, to take effect in possession or profit immediately on the death of her husband." [14]

An antenuptial agreement by which a woman, in consideration of five dollars and of love and affection, releases all right of dower which, upon the death of her intended husband, she as his widow may have in his estate, is not sufficient to bar her dower therein.[15]

### §109. How Assent Expressed.

"Such assent shall be expressed, if the woman be of full age, by her becoming a party to the conveyance by which it is settled, and if she be under age, by joining with her father or guardian in such conveyance." [16]

### §110. Antenuptial Settlement.

The statute also provides that "any pecuniary provision that shall be made for the benefit of an intended wife, and in lieu of dower, shall, if assented to as provided in the preceding section (C. L. '97, §8932; Howell, 2nd Ed. §10924), bar her right of dower in all the lands of her husband." [17]

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[11] Greiner v. Klein, 28 Mich. 12.

[12] Snyder v. Snyder, 6 Mich. 470.

[13] Wheeler v. Smith, 55 Mich. 355, 21 N. W. 370.

[14] C. L. '15, (11663); Howell, 2nd. Ed., §10923.

[15] In re Estate of Pulling, 93 Mich. 274, 52 N. W. 1116.

[16] C. L. '15, (11664); Howell, 2nd. Ed., §10924; In re Pulling's Estate, 93 Mich. 274, 277, 52 N. W. 1116.

[17] C. L. '15, (11665); Howell, 2nd. Ed., §10925; 6 Johns. Ch. 194; 1 Johns. 307; Thompson v. Tucker-Osborn, 111 Mich. 470, 69 N. W. 730.

Antenuptial contracts may be enforced in a court of equity by a bill for specific performance.[18]

## §111. Election in Case of Jointure or Pecuniary Provisions.

If a jointure or pecuniary provision be made for the benefit of an intended wife, before marriage, and without her assent, or if it be made after marriage, she must make her election, after the death of her husband, whether she will take such jointure or pecuniary provision, or be endowed of the land of her husband; but she is not entitled to both.[19]

## §112. Election in Case of Provision by Will of Husband.

If land is devised to a woman, or other provision made for her by the will of her husband, she must make her election whether she will take the land so devised, or the provision so made, or whether she will be endowed of the land of her husband; but she will not be entitled to both, unless it plainly appears by the will to have been so intended by the testator.[20] The election which the widow is required to make is between the provisions in the will, or other provisions mentioned, and dower in the land of which her husband died seized. Her election to take under the will does not bar her dower in land which the husband had conveyed in his life time and during the marriage, by conveyance in which she did not join.[21]

A widow of a testator dying without issue, who elects under the statute (C. L. '97, §8935; Howell, 2nd Ed. §10927), to take under the statute rather than under the will, becomes entitled to the dower interest in his land provided for by C. L. '97, §8918; Howell, 2nd Ed. §10910, and not to the one half interest in his land provided for by the statute of descent; a wife may be cut off from the benefit of the statute of descent by the provisions of her husband's will.[22]

A widow's relinquishment of dower, and her acceptance of the provisions of the will, makes her a creditor of the estate on the same footing with other creditors, and if the estate is insufficient her provision can only be paid *pro rata* with other creditors.[23]

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[18] Thompson v. Tucker-Osborn, 111 Mich. 470, 69 N. W. 730; Koch v. Koch, 126 Mich. 187, 85 N. W. 455.

[19] C. L. '15, (11666); Howell, 2nd. Ed., §10926; 6 Johns. Ch. 194; Koch v. Koch, 126 Mich. 189, 85 N. W. 455; Killackey, v. Killackey, 156 Mich. 127, 135, 120 N. W. 680.

[20] C. L. '15, (11666); Howell, 2nd. Ed., §10927.

[21] Westbrook v. Vanderburgh, 36 Mich. 30; Killackey v. Killackey, 156 Mich. 135, 120 N. W. 680.

[22] Stearns v. Perrin, 130 Mich. 456, 90 N. W. 712.

### §113. Election.—What Constitutes.

When a widow is entitled to make an election whether she will take under her husband's will, or under the provisions of the statute, she is deemed to have elected to take such jointure, devise or other provision, unless within one year after the death of her husband she shall commence proceedings for the assignment or recovery of her dower.[24] The statute does not permit the widow to make two elections, one accepting the terms of the will as to real estate and rejecting its terms as to personal property.[25]

If a widow fails to commence proceedings for the assignment or recovery of her dower within one year after the death of her husband, as provided by statute, and petitions the probate court to proceed under the provisions of the will and allow her a reasonable sum out of the estate, instead of her dower interest in lieu thereof, she waives her right of dower, and has elected to take under the will,[26] but this does not waive her homestead right if one exists.[27]

The statutory right of a widow to elect to take under the provisions of the statute in lieu of the terms of the will is a personal right and not assignable.[28]

### §114. New Assignment if Widow Lawfully Evicted.

If a woman is lawfully evicted of lands assigned to her as dower or settled upon her by jointure, or is deprived of the provision made for her by will or otherwise, in lieu of dower, she may be endowed anew, in like manner as if such assignment, jointure, or other provision had not been made.[29]

### §115. Rights of Dower of Non-Residents and Aliens.

"A woman, being an alien, shall not on that account be barred of her dower, and any woman residing out of the state shall be entitled to dower of the land of her deceased husband, lying in this state, of which her husband died seized, and the same may be assigned to her or recovered by her in like manner as if she and her deceased husband had been residents within this state at the time of his death.[30]

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[23] Tracy v. Murray, 44 Mich. 109, 6 N. W. 224.

[24] C. L. '15, (11668); Howell, 2nd. Ed., §10928.

[25] In re Bloss' Estate, 114 Mich. 204, 72 N. W. 148.

[26] Koster v. Gellen, 124 Mich. 149, 82 N. W. 823; In re Smith's Estate, 60 Mich. 142, 27 N. W. 80; In re Bloss' Estate, 114 Mich. 204, 72 N. W. 148.

[27] Koster v. Gillen, 124 Mich. 149, 82 N. W. 823.

[28] In re Service's Estate, 155 Mich. 179, 118 N. W. 948.

[29] C. L. '15, (11669); Howell, 2nd. Ed., §10929.

This section (C. L. '97, §8938; Howell, 2nd Ed. §10930), negatives the right to dower of a widow residing out of the state at the time of her husband's death, except in land of which he died seized. The non-residence mentioned refers to the time of the husband's death.[31]

But in Ligare v. Semple,[32] it is held that if the woman is a non-resident at the time her husband conveys absolutely and divests himself entirely of his seisin and estate, there can be nothing for the right of dower to attach to. She is a non-resident, and the estate and seisin are gone, and the same estate and seisin can never return.

Where a husband at the time of his death has lost title to land by adverse possession, his non-resident widow's dower right is also extinguished. The statute gives a non-resident widow dower in only the lands of which the husband died seized.[33]

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[30] C. L. '15, (11670); Howell, 2nd. Ed., §10930; See R. S. 1838, page 265, Sec. 15, which does not contain the words "of which the husband died seized."

[31] Pratt v. Tefft, 14 Mich. 191, 200.

[32] Ligare v. Semple, 32 Mich. 444.

[33] Putney v. Vinton, 145 Mich. 219, 108 N. W. 655.

## CHAPTER XII.

## RIGHTS, DUTIES AND OBLIGATIONS OF DOWRESS.

§116. Repairs, Waste, Etc.
§117. Widow's Right to Remain in Dwelling House and Have Support.
§118. Damages for Withholding Dower.
§119. Measure of Damages for Withholding Dower.
§120. No Damages Estimated on Improvements.
§121. Damages when Heir Has Aliened the Land.
§122. Assignment of Dower as Bar.
§123. Collusive Recovery of Dower as against Infant Heirs.

### §116. Repairs, Waste, Etc.

Every woman endowed with land is required to maintain the house, tenement, appurtenances and fences in good repair, and if she commits or suffers any waste to be committed, she is liable to the person or persons having the next immediate estate of inheritance therein for all damages occasioned by any waste committed or suffered by her.[1] It is also her duty to pay and discharge her just proportion of all taxes and public burdens laid upon the premises while her estate lasts. And where she holds by virtue of her dower right, in common with others, she also is obliged to bear her just proportion of the expenses necessary to keep the common property in repair. The common owners are liable to contribution to each other for their just proportion of taxes and repairs for their common benefit, and this may be recovered in an action at law.[2]

### §117. Widow's Right to Remain in Dwelling House and Have Support.

The statute permits a woman to remain in the dwelling house of her deceased husband free of rent, for one year after his death, and to have her reasonable sustenance out of his estate for the same period.[3]

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[1] C. L. '15, (11671); Howell, 2nd. Ed., §10931.

[2] Rea v. Rea, 63 Mich. 268, 29 N. W. 703.

[3] C. L. '15, (11672); Howell, 2nd. Ed., §10932; Pettiford v. Zoellner, 45 Mich. 358, 8 N. W. 57; Kitchell v. Midgett, 37 Mich. 86; Covert v. Morrison, 49 Mich. 136, 13 N. W. 390; Zoellner v. Zoellner, 53 Mich. 620, 19 N. W.

It is the duty of a widow who applies for an allowance out of her husband's estate, after the expiration of the statutory year, to make some showing of her needs and circumstances if required by the probate judge.[4] The statute gives the widow the absolute right to her reasonable sustenance out of her husband's estate for the period of one year after his death, and this is a vested right which the probate court has no authority to withhold from her.[5]

The court may in its discretion allow her support out of her husband's estate after the statutory period of one year.

## §118. Damages for Withholding Dower.

Whenever in an action brought for that purpose, a woman shall recover her dower in lands of which her husband shall have died seized, she shall be entitled also to recover damages for the withholding of such dower.[6]

Before dower is assigned the rents and profits of the land go to the administrator, if necessary to pay debts, but if the estate is solvent, and the rents and profits of the land are not needed to satisfy the claims of creditors, the widow will be entitled to her share of them from the time of the husband's death.[7]

## §119. Measure of Damages for Withholding Dower.

Such damages shall be one-third part of the annual value of the mesne profits of the lands in which she so recovered her dower, to be estimated in a suit against the heirs of her husband, from the time of his death; and in suits against other persons, from the time of demanding her dower of such persons.[8]

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556; Rea v. Rea, 63 Mich. 263, 29 N. W. 703; Pulling v. Durfee, 85 Mich. 34, 48 N. W. 48. A widow is entitled as matter of right to her reasonable sustenance out of the estate of her deceased husband for one year after his death, and in case he died testate, the probate judge may use his discretion as to continuing the allowance during the progress of the settlement of the estate, but never for a longer period than until the widow's share is assigned to her—Pulling v. Judge of Probate, 88 Mich. 387, 50 N. W. 319.

[4] Pulling v. Durfee, 88 Mich. 387, 50 N. W. 319.

[5] Bacon v. Judge of Probate, 100 Mich. 189, 58 N. W. 835; Brown v. Joiner, 77 Ga. 232; Pulling v. Judge of Probate, 88 Mich. 387, 50 N. W. 319; Bliss v. Probate Judge, 149 Mich. 271, 112 N. W. 911.

[6] C. L. '15, (11673); Howell, 2nd. Ed., §10933; Rea v. Rea, 63 Mich. 264, 29 N. W. 703.

[7] Miller v. Stepper, 32 Mich. 199, 200.

[8] C. L. '15, (11674); Howell,

The bringing of an action of ejectment to recover dower is a sufficient demand, and if the widow recovers dower in such action, she may institute supplementary proceedings to recover mesne profits without any further demand.[9]

### §120. No Damages Estimated on Improvements.

Damages for withholding dower cannot be recovered for the use of any permanent improvement made after the death of the husband by his heirs, or by any other persons claiming title to the land.[10]

### §121. Damages when Heir Has Aliened the Land.

If a widow recovers dower in land aliened by the heir of her husband, she is entitled, in an action on the case, to recover of such heir her damages for withholding dower, from the time of the death of her husband to the time of alienation by the heir, not exceeding six years in the whole; and the amount which she shall be entitled to recover from such heir shall be deducted from the amount she would otherwise be entitled to recover from such grantee, and any amount recovered as damages from such grantee shall be deducted from the sum which she would otherwise be entitled to recover from such heir.[11]

### §122. Assignment of Dower as Bar.

When a widow has accepted an assignment of dower, in satisfaction of her claim upon all the land of her husband, such acceptance is a bar to any further claim of dower against the heir of such husband, or any grantee of such heir of such husband, unless such widow shall have been lawfully evicted of the land so assigned to her as such dower.[12]

### §123. Collusive Recovery of Dower as against Infant Heirs.

If a widow who is not entitled to dower shall, during the infancy of the heirs of her husband, or any of them, or of any

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2nd. Ed., §10934; Killackey v. Killackey, 166 Mich. 311, 131 N. W. 519.

[9] Killackey v. Killackey, 166 Mich. 315, 131 N. W. 519; Fuller v. Hubbard, 7 Cow. (N. Y.) 13, 16 Am. Dec. 423.

[10] C. L. '15, (11675); Howell, 2nd. Ed., §10935.

[11] C. L. '15, (11676); Howell, 2nd. Ed., §10936.

[12] C. L. '15, (11677); Howell, 2nd. Ed., §10937; Westbrook v. Vanderburg, 36 Mich. 33.

person entitled to the land, recover dower by the default or collusion of the guardian of such infant heir or other person, such heir or other person so entitled shall not be prejudiced thereby, but when he becomes of full age he may bring an action against such widow to recover the lands which were wrongfully awarded to her as dower.[13]

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[13] C. L. '15, (11678); Howell, 2nd. Ed., §10938.

## CHAPTER XIII.

## BARRING DOWER OF INSANE PERSONS AND MINORS.

§124. Insane, Imbecile, Idiotic and Minor Married Women.
§125. Proceedings—Contents of Petition.
§126. Order and Notice of Hearing.
§127. Proceedings:—Appearance and Answer.
§128. Guardian's Sale of Wife's Interest.
§129. Disposition of Fund.
§130. Barring Minor's Dower.
§131. Award of Money in Lieu of Dower.
§132. Dower Claimed by Two or More Widows.

### §124. Insane, Imbecile, Idiotic and Minor Married Women.

Under certain circumstances and conditions the right of dower of insane, imbecile, or idiotic married women may be barred by judicial proceedings.

If the wife has become insane, imbecile, or idiotic, or for any cause shall be unable from defective intellect to join with her husband in the conveyance of real estate, and shall have remained in that condition for more than two years, or when it shall be made to appear to the court that she is incurably insane, she may be barred of her right of dower in the lands of her husband by the order and decree of a court of chancery.[1]

### §125. Proceedings.—Contents of Petition.

In the cases mentioned in the last section, the husband of such insane, imbecile, or idiotic married woman, or any person interested in such real estate, may apply to the circuit court in chancery of the county where such land or any part thereof is situated, by a petition under oath, for the appointment of a guardian and for leave to sell the inchoate right of dower of such married woman.

The petition must state: first, the name, residence and age of the husband, as near as can be ascertained; second, the nature of the disability of such married woman and the length of time it has existed; third, a full description of the land and premises in this state to be affected by such proceedings; fourth, the value of each parcel of real estate, and the amount of encumbrance on it (if any) not affected by, or prior to, her claim of dower; fifth, if the real estate is to be sold by the husband, or has been sold by him, the exact amount of the consideration of such sale as made or agreed upon; and, sixth, the reasons why such sale is desirable to such husband or other person.[2]

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[1] C. L. '15, (12725); Cummins & Beecher's Mich. Judicature Act; Howell, 2nd. Ed., §10939.

## §126. Order and Notice of Hearing.

Upon the filing of such petition, the said circuit court in chancery shall enter an order that the petition be heard on a certain day, and notice of the hearing be given by publication or otherwise, in such manner and to such persons as said court shall direct.[3]

The question of the manner in which and to whom notice of the application and hearing shall be given seems to be left entirely to the discretion of the court. It would probably not be sufficient to serve such notice on the wife personally, for the reason that the petition itself, if prepared in accordance with the statute, must show that she is incompetent to understand and know the effect and purpose of such service. Notice by publication would be no more effectual so far as the wife's competency to understand and comprehend its purpose is concerned. If the incompetent wife is already under guardianship, the most effectual way of insuring the protection of her rights would probably be to serve notice of the hearing on such guardian. If she has no guardian, such notice ought to be served on her nearest relation. Whatever method of service is adopted the court should carefully guard the rights of the incompetent wife and see to it that such notice is given as will be likely to protect her rights fully.

## §127. Proceedings—Appearance and Answer.

At the time appointed for the hearing it should be made to appear to the satisfaction of the court that notice of such hearing has been served in the manner directed in the order. The wife may appear in person or by counsel, or by guardian *ad litem* appointed as in other cases by the court, and may answer such petition within the time and in such manner as the court may direct.

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[2] C. L. '15, (12726); Cummins & Beecher's Mich. Judicature Act, §849; Howell, 2nd. Ed., §10940.

[3] C. L. '15, (12727); Cummins & Beecher's Mich. Judicature Act, §850; Howell, 2nd. Ed., §10941.

Upon the filing of the answer the case is deemed at issue. When the case is at issue, or if the wife shall fail to appear, the court may proceed summarily, upon oral or written evidence taken under its order, to hear and determine the case, or in its discretion may refer it to a circuit court commissioner, or a special commissioner appointed by the court, to take proofs and report the same to the court, with his opinion thereon: first, as to the insanity or imbecility of the respondent; second, as to the propriety or necessity of selling said real estate, or of barring the respondent's right of dower therein: and third, the cash value at that time of her dower interest in said premises, taking into consideration the respective ages of said husband and wife.

Upon the closing of proof, if taken before the court, and upon the coming in of the commissioner's report, if the case has been referred to a commissioner, the court will consider the same, and enter such order and decree as shall be just and equitable. If the court finds that the respondent is insane, and that it is desired that her right of dower should be barred, the then present value of such dower will be fixed by the court. After the present value of the dower has been fixed, the court should appoint a guardian of such insane person. The husband cannot be appointed as such guardian. The guardian appointed must give a bond in such sum and with such sureties as the court may direct, conditioned to receive and invest any money that may come into his hands for the sole use and benefit of his ward, under the order and direction of the court, both as to its investment and the disposition of the income thereof.[4]

## §128. Guardian's Sale of Wife's Interest.

Upon the approval of such bond by the court, the guardian may sell the interest of such married woman in such land at private sale, but not for a less sum than the value fixed by the court. He may join with the husband in a conveyance, or if the husband has previously sold and conveyed the land, the guardian may by separate deed convey such right of dower to the husband's grantee or grantees, or his or their heirs or assigns, but to no other person.

"Such conveyance shall in all cases be as effectual to bar the right of dower of said married woman as if she had, being of sound mind, joined her husband in a deed of such premises." [5]

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[4] C. L. '15, (12728); Cummins & Beecher's Mich. Judicature Act, §851; Howell, 2nd. Ed., §10942.

## §129. Disposition of Fund.

"Said guardian shall apply the income of said money to the support of said married woman, or allow the same to accumulate, as the court shall direct; and upon the restoration of said married woman to a sound mind shall, upon the order of the court, transfer to her all of the funds in his hands, and upon her death, shall deliver the same to her husband, if he shall be living at her death, and if not living, then to her personal representative.[6]

## §130. Barring Minor's Dower.

"Any married woman residing within this state, having arrived at the age of eighteeen years, may bar her right of dower in any estate conveyed or mortgaged by her husband, by joining in the deed of conveyance or mortgage and acknowledging the same as now required by law for the acknowledgments of deeds, and may do any other act concerning her rights in lands owned by her husband which she might do if she were twenty-one years of age.[7]

## §131. Award of Money in Lieu of Dower.

In any suit commenced by a widow for the recovery of dower in lands which were aliened by her husband in his lifetime, and where her dower therein cannot be set off by metes and bounds without injustice or manifest injury to the widow or the owners, the court having cognizance of the case may award a sum of money in lieu of dower to be paid to the widow, or may assign to her, as tenant in common, a just proportion of the rents, issues and profits of such lands, regard being had in all cases to the true value of the lands at the time of such alienation by the husband, and of the probable duration of the life of the dowress, at the time such money shall be adjudged, or such rents, issues and profits shall be awarded to her.[8]

[5] C. L. '15, (12729); Cummins & Beecher's Mich. Judicature Act, §852; Howell, 2nd. Ed., §10943.

[6] C. L. '15, (12730); Cummins & Beecher's Mich. Judicature Act, §853; Howell, 2nd. Ed., §10944.

[7] '15, (11679); Howell, 2nd. Ed., §10945.

[8] C. L. '15, (12731); Cummins & Beecher's Mich. Judicature Act, §854; Howell, 2nd. Ed., §10946; Rockwell v. Rockwell, 81 Mich. 493, 46 N. W. 8.

The propriety of converting into money such property as cannot be partitioned is recognized by statute. The estate of a doweress may be so commuted.[9]

## §132. Dower Claimed by Two or More Widows.

It sometimes happens that two or more widows claim dower rights in the same land. In such cases the statute provides that "when dower in any lands shall be claimed by two or more widows, the one whose husband was first seized therein shall be first entitled thereto; and in all cases where dower in any lands shall have been assigned, or where it shall appear that the owner or owners, or the person or persons having an interest therein, shall have made full satisfaction to, and have obtained a discharge from, the person recovering or having a prior right to dower therein, by reason of the prior seisin of her husband, the said land shall not be subject to any other claim of dower during the lifetime of the person so recovering or who has received satisfaction and given a discharge as aforesaid." [10]

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[9] Brown v. Bronson, 35 Mich. 415. A husband cannot by any act of his prejudice his wife's right of dower. Chase v. Angel, 148 Mich. 1, 108 N. W. 1105.

[10] C. L. '15, (11687); Howell, 2nd. Ed., §10947.

# CHAPTER XIV.

## HOMESTEAD RIGHTS OF WIFE OR WIDOW.

§133. Constitution.
§134. What Constitutes Homestead.
§135. Object of Exemption.
§136. Land Purchased for Homestead;—Intention.
§137. Title in Fee not Necessary.
§138. Homestead in Land Held in Joint Tenancy or Tenancy in Common.
§139. Homestead Rights as against Mechanic's Lien.
§140. Alienation of Homestead.
§141. Abandonment of Homestead.
§142. Homestead Exemption to Family after Death of Husband.
§143. Homestead Rights of Widow when Owner Dies Leaving no Children.

### §133. Constitution.

A mortgage or deed of a homestead of a married man is void unless signed by the wife.[1]

### §134. What Constitutes Homestead.

Under the constitution of this state a homestead consists of not to exceed forty acres of land and the dwelling house thereon and the appurtenances, to be selected by the owner, and not included in any town plat, city or village; or instead thereof, at the option of the owner, any lot in any city, village or recorded town plat, or such part of lot as shall be equal thereto, and the dwelling house thereon and its appurtenances, owned and occupied by any resident of the state, not exceeding in value fifteen hundred dollars, and is exempt from forced sale on execution or any other final process against the owner.[2]

### §135. Object of Exemption.

The object of the homestead exemption is not only for the benefit of the owner but that of his wife and children as well.[3]

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[1] Const. 1908, Art. XIV, Sec. 2.

[2] Const. 1908, Art. XIV, Sec. 2.

[3] Beecher v. Baldy, 7 Mich. 488; Snyder v. People, 26 Mich.

It is an absolute right, and not a mere personal privilege which, to be effectual, must be claimed.[4]

Ownership and actual occupancy of a homestead consisting of separate parcels of land within the prescribed quantity and value is a sufficient selection to secure the exemption.[5]

A homestead upon unplatted land in a village is not limited to the quantity in a lot of the usual size in the platted part.[6]

The fee of the land is not exempted as a homestead, but the constitution prohibits the land being sold on execution or other final process against the owner while it is occupied as a homestead.[7]

## §136. Land Purchased for Homestead; Intention.

A city lot purchased by a single man in contemplation of his marriage and with the intention of making it a homestead, will be exempt as such from levy and sale on execution even before any dwelling house is erected on it if the man is subsequently married and he and his wife have enclosed, improved and used it with the constant purpose of making it their home, as soon as their means will permit.[8]

A vacant unimproved lot with no dwelling house thereon may be exempt from levy and sale on execution if it was purchased with the intention of making a homestead for the purchaser if he encloses and occupies it and uses it with the constant intention of making it his home, and uses such means as he can procure within a reasonable time to erect a house thereon for his family, provided it does not exceed in quantity and value the constitutional limit. In such case the lot would be exempt from the date of the purchase.[9]

But a widow, having only married children, and no means

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106; Comstock v. Comstock, 27 Mich. 97; Dye v. Mann, 10 Mich. 291; King v. Moore, 10 Mich. 538.

[4] McKee v. Wilcox, 11 Mich. 358; Riggs v. Sterling, 60 Mich. 650, 27 N. W. 705; Stanton v. Hitchcock, 64 Mich. 325, 31 N. W. 395.

[5] Beecher v. Baldy, 7 Mich. 488; Thomas v. Dodge, 8 Mich. 51.

[6] Barber v. Rorabeck, 36 Mich. 399.

[7] Drake v. Kinsel, 38 Mich. 232.

[8] Reske v. Reske, 51 Mich. 541, 16 N. W. 887.

[9] Deville v. Widow, 64 Mich. 593, 31 N. W. 533; Barber v. Rorabeck, 36 Mich. 399, Bouchard v. Bourassa, 57 Mich. 8, 23 N. W. 452; Griffin v. Nichols, 51 Mich. 575, 17 N. W. 63; Schofield v. Hopkins, 61 Wis. 3, 70, 21 N. W. 259; Mills v. Hobbs, 76 Mich. 122, 42 N. W. 1084; Jossman v. Rice, 121 Mich. 270, 80 N. W. 25.

with which to build a house, or prospect of any, cannot claim homestead right in a vacant lot which she has owned for upwards of three years, and occupied only by making garden therein. Intention without occupancy cannot create a homestead or raise homestead rights. The constitution requires both occupancy and intention.[10]

## §137. Title in Fee not Necessary.

A title in fee is not necessary to entitle an occupant of land to a homestead therein. An owner, within the meaning of the exemption law, is anyone who has an interest in and occupies the premises as his home.[11]

The exemption extends to an equitable interest, notwithstanding the legal title may be in another,[12] and to a building occupied as a homestead located on land of which the occupant of the building is not the owner.[13]

A homestead is protected in land occupied under a contract to purchase, or under a lease.[14]

The law only exempts the homestead from sale on execution, or from private sale without the concurrence of the wife, and does not divest the right of the owner of the land, nor impair any remedy which the law gives him.[15]

A homestead is protected against the claims of creditors of the person who is entitled to occupy it as a homestead, and while it is actually occupied as his home, but it does not protect the person in possession of such home against the rights of the owner of the land. A married woman may convey land owned by her in fee, but occupied by herself and husband as a homestead, without his joining in the deed of conveyance, and when that is done, the homestead right is extinguished as against the wife's grantee.[16] But when a husband and wife are jointly in possession of a homestead in land owned by the wife, the husband has a right to complain of any unlawful interference with his homestead rights therein.[17]

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[10] Ware v. Hall, 138 Mich. 70, 101 N. W. 47.

[11] Lozo v. Southerland, 38 Mich. 168; McKee v. Wilcox, 11 Mich. 358.

[12] Orr v. Shraft, 22 Mich. 260.

[13] Bunker v. Paquette, 37 Mich. 79.

[14] McKee v. Wilcox, 11 Mich. 358; Matta v. Kippola, 102 Mich. 116, 60 N. W. 300; Pelan v. Debevard, 13 Iowa 53; Conklin v. Foster, 57 Ill. 104; Johnson v. Richardson, 33 Miss. 462; Thompson, Homestead. Sec. 176; Smyth, Homestead, Sec. 117.

[15] Matta v. Kippola, 102 Mich. 118, 60 N. W. 300; Buckingham v. Buckingham, 81 Mich. 89, 45 N. W. 504.

[16] Buckingham v. Buckingham, 81 Mich. 89, 45 N. W. 504.

## §138. Homestead in Land Held in Joint Tenancy or Tenancy in Common.

The constitution and statutes of this state have always been liberally construed as to homestead rights. The law does not require that the person who claims certain premises as a homestead should own the entire title. The word "owner" as used in the constitution and statute relating to homestead rights has generally been construed to include any and all parties who have a claim or interest in the property, occupied by them as their home, although such claim or interest may be an undivided one or fall far short of an absolute ownership. Thus, a homestead right may exist in land occupied and held in joint tenancy, or by husband and wife as tenants by entireties.[18] So, under the homestead laws of this and other states, it is held that one who occupies land as tenant in common with others may have a homestead right therein which will be protected as against claims of creditors.[19]

A farm homestead right cannot be changed or put in jeopardy by the extension of village or city limits so as to bring such farm property within the limits of such city or village.[20]

The homestead exemption from levy and sale on execution is an exemption of an entirety, although a homestead may also be claimed in lands held in joint tenancy, or by tenancy in common not exceeding the homestead limitation in quantity.[21]

A temporary removal from a homestead with the intention of a speedy return does not constitute an abandonment of homestead rights.[22]

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[17] Rome v. Kellogg, 54 Mich. 209, 19 N. W. 957.

[18] Lozo v. Southerland, 38 Mich. 168; Thomas v. Robinson, 43 Mich. 502, 5 N. W. 988; Cole v. Cole, 126 Mich. 571, 85 N. W. 1098.

[19] Lozo v. Southerland, 38 Mich. 172; McCleary v. Bixby, 36 Vt. 257; Thorn v. Thorn, 14 Iowa 49; Horn v. Teft, 39 N. H. 478; Cleaver v. Bigelow, 61 Mich. 53, 27 N. W. 85; King v. Wilson, 83 Mich. 197, 47 N. W. 106; Lawrence v. Morse, 122 Mich. 27, 80 N. W. 1087.

[20] Barber v. Rorabeck, 36 Mich. 401.

[21] Amphlett v. Hibbard, 29 Mich. 298; Thorp. v. Allen, 46 Mich. 392, 9 N. W. 443.

[22] Burkhardt v. Walker, 132 Mich. 95, 92 N. W. 778; Bunker v. Paquette, 37 Mich. 79; Kaeding v. Joachimstachl, 98 Mich. 78, 56 N. W. 1101; Hitchcock v. Misner, 111 Mich. 180, 69 N. W. 226.

While property is occupied as a homestead there is no interest which can be taken and sold as against the owner. The fee in land occupied as a homestead cannot be sold on an execution against the owner.[23]

## §139. Homestead Rights as against Mechanic's Lien.

A homestead is protected against a mechanic's lien or a lien for materials furnished for a building erected thereon, unless the agreement for its erection is in writing and describes the premises, and is signed by the owner, and by his wife if he is a married man.[24]

The statute in relation to liens of mechanics and others provides that if the title to the land against which a lien is sought to be established for buildings erected or improvements made thereon, or labor or material furnished for the same, is held by husband and wife jointly, or is held and occupied as a homestead, the lien provided for by the act shall attach to such land and improvement if the improvements be made in pursuance of a contract in writing signed by both the husband and the wife.[25]

The right to obtain a lien on real estate for labor or materials furnished is purely a statutory one. It is in derogation of the common law, and the essential requirements of the statute must be observed.[26]

The statute permits a lien on land owned by husband and wife jointly, or occupied and held by them as a homestead, only when the improvements for which a lien is sought to be established are made in pursuance of a written contract signed by both of them. This written contract and the signature of both husband and wife are essential requirements of the law, which must be complied with in order to establish a lien in such cases.[27]

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[23] Burkhardt v. Walker, 132 Mich. 93, 95, 92 N. W. 778; Lozo v. Southerland, 38 Mich. 168; Myers v. Weaver, 101 Mich. 477, 59 N. W. 810; Hitchcock v. Misner, 11 Mich. 180, 69 N. W. 226.

[24] Hammond v. Wells, 45 Mich. 11, 7 N. W. 218; Burtch v. McGibbons, 98 Mich. 190, 56 N. W. 1110.

[25] C L. '15, (14797); Howell, 2nd. Ed., §13767.

[26] Hall v. Erkfitz, 125 Mich. 355, 84 N. W. 310; Wager v. Briscoe, 38 Mich. 587; Knapp v. Swaney, 56 Mich. 345, 23 N. W. 162; Sheridan v. Cameron, 65 Mich. 580, 32 N. W. 894; Lindsay v. Huth, 74 Mich. 712, 42 N. W. 358; Electric Co. v. Morris, 100 Mich. 502, 59 N. W. 151.

[27] Frolich v. Carroll, 127

## §140. Alienation of Homestead.

Any deed, release or mortgage (except a mortgage given for purchase money of the land) of a homestead given by a married man without the signature of his wife is void as to both.[28]

A deed or mortgage given by a husband of his homestead, without his wife's signature, being absolutely void, a subsequent removing or ending of the exemption, by removal from the homestead land and ceasing to occupy it as a home, or a subsequent deed by both husband and wife, will not revive the deed given by the husband alone or make it valid or effective.[29] But where the exempted land is a part of a larger tract included in the husband's conveyance the deed is good as to the excess or residue.[30]

A husband's sole deed of a homestead is not made good by giving possession to the purchaser, but if it covers more land than that exempted by law it will be good as to the excess.[31]

## §141. Abandonment of Homestead.

A homestead is not abandoned by the mere absence of the

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Mich. 561, 86 N. W. 1034; Bauer v. Long, 147 Mich. 351, 110 N. W. 1059; Lumber Co. v. Wyrembolski, 164 Mich. 71, 128 N. W. 1083; Frolich v. Blackstock, 155 Mich. 604, 119 N. W. 906; Sheldon v. Brewer, 166 Mich. 578, 132 N. W. 117; Jossman v. Rice, 121 Mich. 270, 80 N. W. 25; Halladay v. Mathewson, 146 Mich. 336, 109 N. W. 669.

[28] Dye v. Mann, 10 Mich. 291; McKee v. Wilcox, 11 Mich. 358; Ring v. Burt, 17 Mich. 465; Fisher v. Meister, 24 Mich. 447; Snyder v. People, 26 Mich. 106; Comstock v. Comstock, 27 Mich. 97; Wallace v. Harris, 32 Mich. 380; Amphlett v. Hibbard, 29 Mich. 298; Phillips v. Stauch, 20 Mich. 369; Watertown Ins. Co. v. G. & B. S. M. Co., 41 Mich. 131; Sherrid v. Southwick, 43 Mich. 515, 5 N. W. 1070; Matta v. Kippoli, 102 Mich. 116, 60 N. W. 300.

[29] Dye v. Mann, 10 Mich. 291; Amphlet v. Hibbard, 29 Mich. 298.

[30] Dye v. Mann, 10 Mich. 291; Wallace v. Harris, 32 Mich. 380; Stevenson v. Jackson, 40 Mich. 702; Hanchett v. McQueen, 32 Mich. 22; Griffin v. Johnson, 37 Mich. 87; Smith v. Rumsey, 33 Mich. 183; Cooper v. Cooper, 162 Mich. 304, 127 N. W. 266.

[31] Phillips v. Stauch, 20 Mich. 369; Stevenson v. Jackson, 40 Mich. 702. The conveyance of a homestead by a debtor to his wife or others, although without consideration, will not subject it to execution. Smith v. Rumsey, 33 Mich. 183; Matson v. Melchor, 42 Mich. 474, 4 N. W. 200; Patnode v. Darveau, 112 Mich. 127, 70 N. W. 439, 71 N. W. 1095; Eagle v. Smilie, 126 Mich. 612, 85 N. W. 1111. These cases in effect overrule the case of Herschveldt v. George, 6 Mich. 456.

[32] Chamberlain v. Lyell, 3 Mich. 448.

[33] Beecher v. Baldey, 7 Mich.

owner from the state when his wife continues to occupy the home and the husband has not acquired an independent homestead elsewhere.[35]

The owner of a homestead cannot hold homestead rights in a house and lot from which he has removed with his family, and to which he has no definite intention of returning.[36]

## §142. Homestead Exemption to Family after Death of Husband.

The constitution also exempts a homestead from the payment of the debts of the deceased owner in all cases during the minority of his children.[37]

The fee is not exempt, but the land only, while it is occupied as a homestead by the widow and minor children. Subject to homestead rights the lands are assets when needed to pay the debts of the estate.[38]

## §143. Homestead Rights of Widow when Owner Dies Leaving no Children.

If the owner of the homestead die, leaving a widow but no children, such homestead shall be exempt, and the rent and profits thereof shall accrue to her benefit during the time of her widowhood, unless she be the owner of a homestead in her own right.[39]

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487; Penniman v. Pierce, 9 Mich. 509; Dye v. Mann, 10 Mich. 291; Dyson v. Sheely, 11 Mich. 527;

[34] Penniman v. Pierce, 9 Mich. 509, 528. A lease of a homestead, the title to which is in the husband, is valid if signed by both husband and wife although the husband only is named in the body of the instrument. Barrett v. Scott, 112 Mich. 220, 70 N. W. 1038.

[35] Gadsey v. Monroe, 115 Mich. 282, 73 N. W. 367. An attempted conveyance of a homestead by a husband without the wife's signature, though expressly made subject to a life estate previously conveyed to the wife, is void. Gadsey v. Monroe, 115 Mich. 282, 73 N. W. 367.

[36] Smith v. Kidd, 123 Mich. 193, 81 N. W. 916; Hoffman v. Busthman, 95 Mich. 538, 55 N. W. 458. A lease of a homestead and other real property of such a nature as to exclude the wife of possession of the homestead is void without her signature. Mailhot v. Turner, 157 Mich. 167, 121 N. W. 804; Township of Jasper v. Martin, 161 Mich. 336, 126 N. W. 473.

[37] Constitution 1908, Art. XIV, Sec. 3; Zoellner v. Zoellner, 53 Mich. 625, 19 N. W. 556; Riggs v Sterling, 60 Mich. 650, 27 N. W. 705; Robinson v. Baker, 47 Mich. 621, 11 N. W. 410.

[38] Drake v. Kinsel, 38 Mich. 232; Showers v. Robinson, 43 Mich. 502, 5 N. W. 988.

[39] Constitution 1908, Art. XIV, Sec. 4.

Upon the death of children left by the husband, the widow stands in the same situation as if no child had been left alive. But a widow whose child dies after her husband and who marries again loses the homestead right acquired through her former husband, though she retains her dower.[40]

Where a widow without children elects to take under the will which provides for a sale of the real estate and a payment to her in cash in lieu of dower, she is still entitled to the homestead interest granted by the constitution. Her election to take under the will and her receipt of the proceeds of the sale do not bar her homestead rights nor estop her from claiming the same.[41]

Although a widow whose child dies after her husband loses her homestead rights acquired through her former husband when she marries again, she retains her dower. Her second marriage ends her widowhood and with it all rights to the homestead.[42]

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[40] Dei v. Habel, 41 Mich. 88, 1 N. W. 964.

[41] Koster v. Vellen, 124 Mich. 149, 82 N. W. 823. A homestead exemption is an absolute right and not a mere personal privilege to the owner. Hence creditors of a decedent cannot complain of a voluntary conveyance of his homestead by the owner during his last sickness, even although he left neither wife nor children surviving him. Eagle v. Smylie, 126 Mich. 612, 85 N. W. 1111; Farrand v. Caton, 69 Mich. 243, 37 N. W. 203; Anderson v. Odell, 51 Mich. 492, 16 N. W. 870; Rhead v. Hounson, 46 Mich. 243, 9 N. W. 267; Pult v. Gellen, 47 Mich. 570, 11 N. W. 385; Vermont Sav. Bank v. Elliott, 53 Mich. 256, 18 N. W. 805; Armitage v. Toll, 64 Mich. 412, 31 N. W. 408; Toll v. Davenport, 74 Mich. 386, 42 N. W. 63; Cullen v. Harris, 111 Mich. 20, 69 N. W. 78, 66 Am. St. R. 380.

[42] Dei v. Hable, 41 Mich. 88, 1 N. W. 964.

# CHAPTER XV.

# STATUTORY PROVISIONS IN RELATION TO HOMESTEAD RIGHTS.

§144. In General.
§145. Statutory Definitions and Exemptions.
§146. Mortgage Lawfully Obtained.
§147. Selection of Homestead when Levy of Execution is Made.
§148. When Officer to Make Survey.
§149. How Sale Made after Survey.
§150. House on Land of Another:—Not Exempt from Sale for Taxes.
§151. Appraisal and Notice when Homestead Exceeds Fifteen Hundred Dollars in Value.
§152. How Homestead Advertised and Sold for Surplus.

## §144. In General.

As shown in the last chapter, the constitution defines the homestead and prescribes the extent and value of property which may be claimed as exempt by the owner, and the right and interest of the wife and family, the widow and minor children of the deceased only.

The statutory homestead exemption as prescribed by the legislature is the same as that provided by the constitution.

It would not be competent for the legislature to add to or take from the limitations of the constitution in regard to the amount or value of the homestead exemption. Nor can the legislature change or modify the constitutional provisions as to the time and the conditions under which the homestead exemptions may exist.

## §145. Statutory Definitions and Exemptions.

The statutory provisions defining a homestead and exempting the same from levy and sale on execution or other final process are as follows: "A homestead consisting of any quantity of land not exceeding forty acres, and a dwelling house thereon and its appurtenances, to be selected by the owner thereof, and not included in any recorded town plat, city or village, or instead thereof, at the option of the owner, a quantity of land not exceeding in amount one lot, being within a recorded town plat, city or village, and a dwelling house thereon and its appurtenances owned and occupied by any resident of this state, shall not be subject to forced sale on execution or any other final process from a court, for any debt or debts growing out of or founded upon contract either expressed or implied made after the third day of July, A. D. 1848. This section shall be deemed and construed to exempt such homestead in the manner aforesaid during the time it shall be occupied by the widow or minor child or children of any deceased person, who was when living entitled to the benefit of this act."[1]

The same owner cannot have two homesteads at the same time, nor can a homestead right exist in two distinct places.[2]

The selection of a homestead need not be in writing, nor is it necessary that any other particular formality be gone into in order to fix and preserve the rights of the owner and his family.

The occupancy of the land by placing a dwelling house thereon and living in it, making the home there, is sufficient of itself to declare it a homestead, and is notice to everyone of its selection.[3]

Actual residence on the land intended for a homestead is not necessary to its exemption as such if there is such occupancy by the owner for such purposes as are usually employed in a home, coupled with *bona fide* intention of the owner to make a home of the land.[4]

Temporary absence will not cut off homestead rights, nor will the fact that the owner's wife does not live with him on the land deprive him of homestead rights. Nor will the fact that the owner's wife has abandoned him and is seeking a divorce deprive him of his homestead exemption.[5]

Removal of the owner to his father's home on account of the father's ill health, and the acceptance of a deed of another

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1. C. L. '15, (12888); Cummins & Beecher's Mich. Judicature Act, §1011; Howell, 2nd Ed., §13072.

2. Wheeler v. Smith, 62 Mich. 373, 28 N. W. 907; L. A. Plant v. Lester, 150 Mich. 336, 113 N. W. 1115.

3. Riggs v. Sterling, 60 Mich. 643, 27 N. W. 705; Evans v. V. R. L. & D. R. R. Co., 68 Mich. 609, 36 N. W. 687.

4. Bowles v. Hord, 71 Mich. 160, 39 N. W. 24; Reske v. Reske, 51 Mich. 541, 16 N. W. 895; Deville v. Widoe, 64 Mich. 593, 31 N. W. 533; Mills v. Hobbs, 76 Mich. 129, 42 N. W. 1084; Karn v. Hanson, 59 Mich. 380, 26 N. W. 666.

5. Earle v. Earle, 60 Mich. 30, 26 N. W. 822.

home, will not constitute an abandonment of the homestead if it is the intention of the owner to return and not abandon it.[6]

## §146. Mortgage Lawfully Obtained.

The homestead exemption does not extend to any mortgage thereon lawfully obtained, but any mortgage or other alienation of the homestead by the owner thereof, if a married man, is void without the signature of the wife to the same, unless such mortgage shall be given to secure the purchase money of the land or some part thereof.[7]

Where a mortgage has been executed by husband and wife, by an imperfect description of the homestead, it may be corrected like any other conveyance, and will not be postponed to an attachment or execution levy. When the husband and wife have executed a mortgage which was meant to cover their homestead, they have bound the homestead if the description is not so defective as to make it beyond the power of the court to identify the property intended to be covered by the mortgage.[8]

A conveyance or mortgage of a homestead without the wife's signature, being void when executed, will not be made valid by the husband and wife removing from and abandoning the homestead premises,[9] and a subsequent joint conveyance by the husband and wife will stand as against the former conveyance by the husband alone.[10]

Nor will the subsequent death of the wife make valid that which was void before.[11]

When the homestead is incapable of division, and is worth more than fifteen hundred dollars, that amount of its value, over and above all prior mortgages thereon, is exempt, and this interest may be mortgaged or conveyed by the owner and his wife, if he is married, and such mortgage or conveyance to the amount of fifteen hundred dollars will take priority over any previous levies thereon.[12]

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[6] Hitchcock v. Misner, 111 Mich. 180, 69 N. W. 226.

[7] C. L. '15, (12889); Cummins & Beecher's Mich. Judicature Act, §1012; Howell, 2nd. Ed., §13073.

[8] Byschlay v. Wagoner, 46 Mich. 90, 8 N. W. 693; Stevenson v. Kurtz, 98 Mich. 494, 57 N. W. 580.

[9] Phelps v. Stauch, 20 Mich. 369.

[10] Dye v. Mann, 10 Mich. 291; Amphlett v. Hibbard, 29 Mich. 298.

[11] Shumacher v. Collins, 49 Mich. 597, 14 N. W. 559.

[12] Vermont Sav. Bank v. Elliott, 53 Mich. 256, 18 N. W. 805; Lozo v. Sutherland, 38 Mich. 168.

The right of homestead of minor children of their deceased father, cannot be defeated by the act of their mother. She can neither abandon or convey it away so as to cut off the homestead rights of the minor children.[13]

The assignment of a land contract constituting a homestead by the husband without the signature of the wife is void; but where it appears that the failure of the wife to execute such assignment was due to advice that it was not necessary, and that she voluntarily abandoned such homestead for another, and defendant had in good faith made valuable improvements thereon and incumbered the property, she is estopped by her conduct to assert such rights in a court of equity.[14]

A conveyance of her homestead rights by a wife separate from her husband, pursuant to an oral agreement of her husband to convey, is ineffectual.[15]

### §147. Selection of Homestead when Levy of Execution is Made.

The statute permits a levy of execution on land, a portion of which is occupied as a homestead, and a foreclosure and sale on a mortgage where the mortgage is void as to the homestead and valid as to the residue of the land covered by the mortgage, and makes provisions for selection, by the owner, of the homestead which is exempt. The statute provides: "That whenever a levy shall be made upon, or a circuit court commissioner shall advertise for sale under any decree upon the foreclosure of any mortgage not valid as against a homestead, and so stated in such decree, the lands and tenement of the householder whose homestead has not been platted and set apart by metes and bounds, such householder shall notify the officer at the time of making such levy, or at the time of such advertising for sale, what he regards as his homestead, with a description thereof, within the limit above described, and the remainder alone shall be subject to sale under such levy or decree. If at the time of such levy or advertising for sale such householder shall fail or neglect to notify the officer making the levy or advertising such property for sale, what he regards as his homestead, with a description thereof, the officer making the levy or advertising such property for sale shall call upon such householder to make the selection of a homestead out of said land, describing the same minutely. If after such notice the owner of the land shall fail to select his homestead, such officer may select a homestead out of said land for him, and the remainder over and above that part selected by the officer or by the owner of the land, as the case may be, alone shall be subject to sale under such levy or decree: Provided, that in making the selection of the homestead out of the land levied upon or advertised for sale, if such selection is made by the officer making the levy or advertising for sale, he shall select land in compact form, which land so selected by him as the homestead of the owner shall include the dwelling house and its appurtenances thereon."[16]

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[13] Gerber v. Upton, 123 Mich. 607, 82 N. W. 363; Showers v. Robinson, 43 Mich. 502, 513, 5 N. W. 988; Riggs v. Sterling, 60 Mich. 643, 652, 27 N. W. 705; 1 Am. St. R. 554.

[14] Bovine v. Selden, 155 Mich. 556, 119 N. W. 1090.

[15] Lott v. Lott, 146 Mich. 580, 109 N. W. 1049, Hooker &

The homestead right of an execution defendant is not forfeited by his omission to select a homestead, if, being within reach, he is not actually notified of the levy or of the proceedings thereunder, and therefore does not know of any occasion to make a selection.[17]

## §148. When Officer to Make Survey.

If the plaintiff in an execution, or the complainant in a foreclosure decree, shall be dissatisfied with the quantity of land selected and set apart as a homestead, either by the owner of the land or by the officer making the levy or advertising the land for sale, he shall cause the land to be surveyed, beginning at a point to be designated by the owner or by the officer mak-

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Grant, JJ. dissenting. A wife's signature to a direction to a vendor of premises by contract, to convey the premises to another, cuts off her homestead rights under the contract. Stephens v. Leonard, 122 Mich. 125, 80 N. W. 889. Where the equity of redemption in a homestead is not worth more than fifteen hundred dollars, its conveyance is not fraudulent as to creditors of the grantor even though such conveyance is without consideration. Palmer v. Bray, 136 Mich. 85, 98 N. W. 849; Dickey v. Converse, 117 Mich. 449, 457, 76 N. W. 80; Smith v. Rumsey, 33 Mich. 183; Rhead v. Hounson, 46 Mich. 244, 9 N. W. 267; Pulte v. Gellen, 47 Mich. 560, 11 N. W. 385.

But the conveyance of the remainder after the homestead ceases is not a conveyance of the homestead, and if done to defraud creditors will be set aside. O'Connor v. Boylan, 49 Mich. 210, 13 N. W. 519.

[16] C. L. '15, (12890); Cummins & Beecher's Mich. Judicature Act, §1013); Howell, 2nd. Ed., §13074; Comstock v. Comstock, 27 Mich. 103; Bank of Constantine v. Jacobs, 50 Mich. 340, 15 N. W. 500.

[17] Griffin v. Nichols, Shepard Co., 51 Mich. 575, 17 N. W. 63; Zoellner v. Zoellner, 53 Mich. 625, 19 N. W. 556; Kruger v. La Blanc, 75 Mich. 425, 42 N. W. 853.

ing the levy or advertising the sale, and set off the land in compact form, including the dwelling house and its appurtenances, to the amount which the owner is entitled to as a homestead. The expense of the survey is chargeable on the execution or decree and may be collected therefrom.[18]

Where an execution debtor occupies three village lots as a homestead, all in one enclosure, it is the duty of the officer who levies the execution to call upon the owner to make his selection of a homestead, and if the owner fails to make his selection it is the duty of the officer to make it for him.[19]

### §149. How Sale Made after Survey.

After the officer has made the survey and set out the owner's homestead land, he may sell the property levied upon or included in the decree of foreclosure, and not included in that set off as homestead land, in the same manner as provided in other like cases for the sale of real estate; and in giving a deed of the same it should be described as in the original levy, or as described in the foreclosure decree, excepting therefrom by metes and bounds, according to the certificate of the survey, the quantity set off as a homestead.[20]

### §150. House on Land of Another: Not Exempt from Sale for Taxes.

A person owning and occupying a house situated on land which he does not own is entitled to the same homestead exemption of the house as though he owned the land.[21]

Neither the constitution or the statute exempts a homestead from taxation or from a sale for taxes levied thereon.[22]

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[18] C. L. '15, (12891); Cummins & Beecher's Mich. Judicature Act, §1014; Howell, 2nd. Ed., §13075; Riggs v. Sterling, 60 Mich. 657, 27 N. W. 705; Kruger v. La Blanc, 75 Mich. 425, 42 N. W. 853; Averill v. Sav. Bank, 143 Mich. 306, 106 N. W. 865.

[19] C. L. '15, (12890); Cummins & Beecher's Mich. Judicature Act, §1013; Howell, 2nd. Ed., §13074; Averill v. Sav. Bank, 143 Mich. 306, 106 N. W. 865; Geiger v. Greiner, 68 Mich. 153, 36 N W. 48; King v. Willborne, 83 Mich. 195, 47 N. W. 106, 9 L. R. A. 803; LaMont v. LaFever, 96 Mich. 195, 55 N. W. 687.

[20] C. L. '15, (12892); Cummins & Beecher's Mich. Judicature Act, §1015; Howell, 2nd. Ed., §13076; Averill v. Sav. Bank, 143 Mich. 306, 106 N. W. 865.

[21] C. L. '15, (12893); Cummins & Beecher's Mich. Judicature Act, §1016; Howell, 2nd. Ed., §13077; McKee v. Wilcox, 11 Mich. 358; Banker v. Paquett, 37 Mich. 79; Allen v. Crane, 152 Mich. 380, 384, 116 N. W. 392.

[22] C. L. '15, (12894); Cummins & Beecher's Mich. Judicature Act, §1017; Howell, 2nd. Ed., §13078.

## §151. Appraisal and Notice when Homestead Exceeds Fifteen Hundred Dollars in Value.

When a homestead exceeds Fifteen Hundred Dollars in value, the owner does not for that reason lose the benefit of the constitutional and statutory exemption.

Whenever in the opinion of the creditor, or an officer holding an execution or foreclosure decree against the owner of a homestead, the premises claimed by him as a homestead are worth more than fifteen hundred dollars, such officer is required to summon six persons qualified to act as jurors, who shall, upon oath, to be administered to them by such officer, appraise the homestead premises, and in case the value thereof is more than fifteen hundred dollars, and the homestead premises cannot be divided, they must make and sign an appraisal of its value and deliver the same to the officer. The officer is required to deliver a copy of such appraisal to the debtor, or to some member of his family of suitable age to understand the nature of the same, with a notice attached that unless the debtor shall pay the officer the surplus over and above fifteen hundred dollars, or the amount due on the execution or decree, within sixty days thereafter, that such premises will be sold.[23]

Such appraisal is not invalidated by reason of the fact that one of the appraisers is over sixty years of age, notwithstanding the statutory provisions requiring such appraisers to have the qualifications of jurors.[24]

## §152. How Homestead Advertised and Sold for Surplus.

If the debtor does not pay the surplus over and above the fifteen hundred dollars exemption, or the amount due on the execution or foreclosure decree, within sixty days from the time the copy of appraisal and notice was served on him by the officer, such officer may proceed to advertise and sell the premises, and out of the proceeds of the sale pay the debtor fifteen hundred dollars, which amount is exempt from execution for one year thereafter.

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[23] C. L. '15, (12895); Cummins & Beecher's Mich. Judicature Act, §1018; Howell, 2nd. Ed., §13079; First Nat. Bk. of Constantine v. Jacobs, 50 Mich. 341, 15 N. W. 500; Zoellner v. Zoellner, 53 Mich. 626, 19 N. W. 556; Riggs v. Sterling, 60 Mich. 651, 27 N. W. 705; Krueger v. La Blanc, 75 Mich. 424, 42 N. W. 853; Vt. Sav. Bank v. Elliott, 53 Mich. 256, 259, 18 N. W. 805.

[24] Flynn v. Kalamazoo Circuit Judge, 136 Mich. 23, 98 N. W. 740; People v. Rawn, 90 Mich. 377, 51 N. W. 522.

The balance, if any, is to be applied by the officer on the execution or foreclosure decree. The sale must be at public vendue, and no sale can be made of the property unless more than fifteen hundred dollars is bid and received therefor.

If no more than fifteen hundred dollars is bid, the officer may return the execution for want of property, or report the facts to the court in which the foreclosure decree was rendered, as the case may require.

The provisions of this statute do not apply to any mortgage executed before the act took effect.[25]

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[25] C. L. '15, (12896); Cummins & Beecher's Mich. Judicature Act, §1019; Howell, 2nd. Ed., §13080; Zoellner v. Zoellner, 53 Mich. 626, 19 N. W. 556; Krueger v. La Blanc, 75 Mich. 424, 42 N. W. 853.

## CHAPTER XVI.

## SALE OF HOMESTEAD OF DECEASED PERSONS.

§153. By Probate Court to Pay Debts or Expenses.
§154. Court to Fix Location and Description.
§155. Appraisal and Report.
§156. Confirmation of Report. New Appraisal.
§157. Proceedings on Confirmation of Report.

### §153. By Probate Court to Pay Debts or Expenses.

Under some circumstances the homestead of deceased persons may be sold by proceedings in the probate court during the administration of his estate, and the constitutional and statutory exemption preserved and protected for the benefit of the widow and children of the deceased.

In such cases the proceedings as provided for by the statute should be substantially preserved.

Whenever an application is made to a probate court for an order to sell the real estate of a deceased person, for the purpose of paying his debts or the expenses of administration of his estate, it is the duty of the court to ascertain and determine, at the hearing of such application, what portion, if any, of such real estate in fact constituted the homestead of the deceased at the time of his death.[1]

### §154. Court to Fix Location and Description.

If it appears on the hearing of the application that the deceased was the owner of a homestead at the time of his death, which his widow or minor children are entitled to the benefit of, it is the duty of the court to fix, by its decree, the location and description of such homestead, without reference to its value, but not exceeding in extent the quantity exempted by law from the payment of the debts of the deceased. If it appears at the hearing of such application that there is real estate of the deceased, not included in the homestead as fixed and decreed by the court, that may be used for the payment of debts, such land must be first sold, and the proceeds applied according to law. If it shall appear at such hearing that there is no real estate of the deceased, other than that fixed and decreed by the court as a homestead, that may be used for the payment of debts of the deceased and expenses of administration of his estate, or if the proceeds of the sale of the real estate, other than the homestead so fixed and decreed, shall upon the report and confirmation of such sale prove insufficient for the purpose of paying debts of the deceased and expenses of the administration of his estate, the probate court may order a division or sale of such homestead as the circumstances may require.[2]

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[1] C. L. '15, (14031); Cummins & Beecher's Mich. Judicature Act, §2153; Howell, 2nd. Ed., §13081; In Re Emmons' Estate, 142 Mich. 299, 309, 105 N W. 758.

## §155. Appraisal and Report.

Before a division or sale of a homestead of a deceased person by the probate court can be made, it must be examined and appraised by three disinterested persons appointed by the probate judge and sworn to faithfully discharge their trust. The persons so appointed are required to examine the homestead and appraise the same at a fair cash value, and, in case such value shall exceed fifteen hundred dollars, they are required to determine whether or not the premises can be divided without material loss or injury, so that a homestead not exceeding fifteen hundred dollars in value can be set apart for the benefit of the widow and family of the deceased.

When the examination and appraisal is completed, the appraisers must make a report in writing, signed by them, to the probate court. The report should show their appraisal of the homestead at its fair cash value, and if such value as determined by them exceeds fifteen hundred dollars, they must also state in their report their determination whether or not the homestead, as fixed by the decree of the probate court, can be so divided, and a homestead, of which the report must show the metes and bounds and in which must be included the dwelling and its appurtenances not exceeding fifteen hundred dollars in value, can be set apart for the widow and family of the deceased.[3]

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[2] C. L. '15, (14031); Cummins & Beecher's Mich. Judicature Act, §2153; Howell, 2nd. Ed., §13081; In Re Emmons' Estate, 142 Mich. 299, 309, 105 N. W. 758.

[3] C. L. '15, (14032); Cummins & Beecher's Mich. Judicature Act, §2154; Howell, 2nd. Ed., §13082; In Re Emmons' Estate, 142 Mich. 299, 309, 105 N. W. 758.

The statute does not fix a time within which the appraisers must examine the premises and make their report, but does require that they shall proceed "with reasonable diligence." The order of the probate court appointing the appraisers should fix a reasonable time within which the examination of the homestead should be made and the determination and report returned to the probate court. The determination and report should be confined to the premises fixed and determined by the decree of the court as the homestead of the deceased.

### §156. Confirmation of Report. New Appraisal.

After the filing of the report and before administration of the estate is finally closed, the probate court, at the request of any person interested in the estate, is required to order all parties interested therein to appear before the court and show cause, if any, why such report should not be confirmed.

Notice of the time to show cause must be given by publishing a copy of the order at least once in each week for three successive weeks in a newspaper published and circulated in the county, and by leaving a copy of the order at the homestead. Proof of such publication and service of a copy of the order at the homestead should be made. The service of a copy of the order at the homestead should be made by delivering the same to some person of suitable age and discretion, capable of understanding its contents, purpose and effect.

At the time appointed, or at some adjourned time, the probate court is required to hear and consider all objections to the confirmation of the report, whether of law or fact, and to confirm the report unless it shall be satisfied that the appraisal is materially unfair or unjust, or that the division as recommended is in some substantial respect improper, in either of which events the court shall disapprove the report and order a new examination and appraisal.

In case a new examination and appraisal is ordered, three other disinterested persons must be appointed for that purpose, who are required to proceed in the same manner, and are subject to like review and action by the probate court.[5]

### §157. Proceedings on Confirmation of Report.

Upon the confirmation of the report of the appraisers the probate court is required to proceed as follows:

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[4] See note 3 this chapter.

[5] C. L. '15, (14033); Cummins & Beecher's Mich. Judicature Act, §2155; Howell, 2nd. Ed., §13083.

First:—If the appraised value of the homestead as fixed by the probate court does not exceed fifteen hundred dollars, no further action can be taken or had in the matter until the homestead exemption ceases.

Second:—If such appraised value exceeds fifteen hundred dollars, and the examiners have reported that the premises can be divided so that a homestead not exceeding fifteen hundred dollars in value can be set apart for the benefit of the widow and family of the deceased, the court is required to make an order that such homestead be set apart for the benefit of the widow or family of the deceased until the same shall cease to be exempt from the payment of the debts of the deceased, and further order that the remainder of the premises be sold for the payment of debts and expenses of administration in the manner provided by law.

Third:—If the appraised value of the homestead as fixed by the court shall exceed fifteen hundred dollars and the appraisers report that it can not be divided and a homestead not exceeding fifteen hundred dollars in value set apart for the benefit of the widow or family of the deceased, the probate court is required to order the whole of such premises to be sold according to law.

The executor or administrator is required to reserve from the proceeds of such sale the sum of fifteen hundred dollars for the benefit of the widow or family of the deceased, and apply the remainder, so far as the same will go, or so far as may be necessary, in payment of the debts of the deceased and the expenses of administration of his estate.

The executor or administrator may invest the sum retained from the proceeds of the sale, with the approval of the probate judge, either in the purchase of a new homestead, or in proper securities for the benefit of the widow or family of deceased, as may seem best, and the same, or the property or security in which it shall be invested, shall remain exempt from the payment of the debts of the deceased and the expense of administering his estate, in like manner as a legal homestead of the deceased had he left one would have remained exempt, and shall finally descend according to the laws of this state governing the descent of real estate.[6]

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[6] C. L. '15, (14034); Cummins & Beecher's Mich. Judicature Act, §2156; Howell, 2nd. Ed., §13084; In Re Emmons' Estate, 142 Mich. 299, 309, 105 N. W. 758; Hamilton v. Wilcox, 167 Mich. 558.

# CHAPTER XVII.

## CONTRACTS OF MARRIED WOMEN.

§158. At Common Law.
§159. Constitutional Provisions.
§160. Statutory Provisions.
§161. General Effect of the Statute.
§162. Purpose of the Statute.
§163. Executory Contracts of Married Women.
§164. Same Subject Continued.
§165. Same Subject Continued.
§166. Authority of Husband as Agent of Wife.
§167. Rights of Husband's Creditors as against the Wife.
§168. Improvements and Materials Furnished to Husband to be Used on Land of Wife.
§169. Necessaries and Family Expenses.
§170. Necessaries and Family Expenses—Contract for Nursing.
§171. Married Woman's Subscription Contract for Public Improvements.
§172. Contract of Married Women Jointly with Husband.
§173. Debts Incurred by Married Woman in her Separate Business.
§174. Debts Contracted on Credit of Wife's Separate Estate.
§175. Contracts for Benefit of Wife's Separate Estate.

### §158. At Common Law.

By the common law a married woman cannot acquire legal rights to personal property, nor make any contract binding upon her during her coverture, and if she have money or goods in her possession and she lend the money or sell the goods, the right to recover the debt for the money loaned, or the value of the goods sold or parted with by the wife, vests in the husband.[1]

Although by the common law a married woman is incapable of making a contract, she is capable of having a chose in action conferred upon her, which will survive to her at her husband's death, unless he had previously reduced it into possession.[2]

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[1] 1 Chitty on Contracts, page 227.

[2] 1 Chitty on Contracts, page 228; Dolson v. Midland Co. R. R. Co., 13 C. B. 474, 478; Scarpellini v. Atcaeson, 7 Q. B. 864, 875; Gaters v. Madelley, 6 M. & W. 423; Fiske v. Cushman, 6 Cush. (Mass.) 20; Draper v. Jackson, 16 Mass. 480; Stanwood v. Stan-

So where a husband and wife have been divorced from the bonds of matrimony, the wife becomes entitled to her choses in action which have not been reduced into possession by the husband during coverture.[3]

## §159. Constitutional Provisions.

The constitution and statutes of most of the states have removed or largely modified the common law disabilities of married women to make contracts. In Michigan, the constitution of 1850 and the present constitution adopted in 1908 provide that "the real and personal estate of every woman, acquired before marriage, and all property to which she may afterward become entitled by gift, grant, inheritance or devise, shall be and remain the estate and property of such woman, and shall not be liable for the debts, obligations or engagements of her husband, and may be devised or bequeathed by her as if she were unmarried."[4]

## §160. Statutory Provisions.

The Michigan married women's act of 1855 provides that "the real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterward become entitled by gift, grant, inheritance, devise or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her, in the same manner and with the like effect as if she was unmarried."[5]

The constitutional and statutory provisions do not remove all of the common law disabilities of married women, nor give them power to make contracts except in relation to their separate property.[6]

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wood, 17 Mass. 57; Phelps v. Phelps, 20 Pick. (Mass.) 556; Adams v. Brockett, 5 Met. (Mass.) 280; Jackson v. Park, 10 Cush. (Mass.) 550.

[3] Legg v. Legg, 8 Mass. 99.

[4] Constitution 1850, Art. XVI, Sec. 5; Constitution 1908, Art. XVI, Sec. 8; Vail v. Winterstein, 94 Mich. 232, 33 N. W. 932; Smith v. Martin, 124 Mich. 34, 82 N. W. 662; Mutual Benefit Assn. v. Wayne Co. Sav. Bank, 68 Mich. 126, 35 N. W. 853.

[5] Act No. 168, P. A. 1855, Sec. 1; C. L. '15, (11485); Howell, 2nd. Ed., §11545.

[6] Howe v. North, 69 Mich. 272, 37 N. W. 213; DeViries v. Conklin, 22 Mich. 259; Russell v. Peoples' Sav. Bk., 39 Mich. 671.

They reserve to a wife the same rights to her property after marriage which she had before marriage.[7]

## §161. General Effect of the Statute.

The statute does not affect the marital unity of husband and wife in the marriage relation. It goes no farther than to insure to the wife the property which she had at the time of the marriage, and such as she may acquire afterward, and to give to her the power which she did not possess at common law, to control, protect and dispose of it in her own name, by her own act, free from the interference or interposition of her husband. It does not affect the family relations, nor deprive the husband of any marital rights, except as they pertain to the wife's separate property. It relieves the husband of no responsibility which the common law imposed upon him, except as to the wife's contracts and debts. He is still under obligations to support her, and is entitled to her services except where such services are given to her individual property or separate business.[8]

## §162. Purpose of the Statute.

This statute, and the constitutional provisions pursuant to which it was enacted, abrogate the common law rule by which the husband was liable for the debts of his wife contracted prior to their marriage,[9] and they abolish the common law rule respecting the husband's rights over his wife's property given to him by virtue of the marriage.[10] It was passed for the protection of married women, and to enlarge, not to contract, their rights, and was not intended to deprive them, whether acting alone or jointly with others, of the right to protect their property interests.[11]

## §163. Executory Contracts of Married Women.

It has been uniformly held in Michigan, since the passage of the married women's act in 1855, that a married woman cannot become personally liable upon her executory contract unless it relates to her sole property. And she cannot be held liable as surety for her husband or any other person, or by reason of being a partner of her husband. In all such cases the statute does not remove the common law disability of married women.

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[7] Wales v. Newbould, 9 Mich. 74, 75.

[8] Snyder v. People, 26 Mich. 106; Glover v. Alcott, 11 Mich. 482, 483; Howe v. North, 69 Mich. 272, 37 N. W. 213.

[9] Smith v. Martin, 124 Mich. 34, 82 N. W. 662.

[10] White v. Zane, 10 Mich. 333; Starkeweather v. Smith, 6 Mich. 377; Gilespie v. Beecher, 94 Mich. 374, 54 N. W. 167.

[11] Gilespie v. Beecher, 94 Mich. 374, 54 N. W. 167.

These rules are all intended for the benefit and protection of the wife, and are in direct antagonism with the doctrine that she cannot protect her title to, or possessions of, property when such title or possession, either as a sole or joint owner, is attacked.[12]

Married women in this state have no general capacity to make an executory contract, and when such a contract is relied upon it is necessary to show the facts that it may be seen that the contract in some way relates to her separate property, and is of that character which would enable her to bind herself personally.[13]

### §164. Same Subject Continued.

A married woman cannot be held liable upon a contract made jointly with her husband for improvements on real estate held by them jointly, by entireties. Such estate is not such separate property of the wife as the statute gives her power to make contracts in relation to. She can neither sell, encumber, or control it while living, nor devise it at her death.

The common law disabilities of married women are only partially removed by the statute, and one who relies upon a contract made by a wife must show that it relates to her separate property.[14]

A married woman cannot make herself personally liable as partner with her husband.[15]

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[12] Gilespie v. Beecher, 94 Mich. 367, 54 N. W. 167.

[13] Tillman v. Shackelton, 15 Mich. 447; Campbell v. White, 22 Mich. 178; DeViries v. Conklin, 22 Mich. 255; Powers v. Russell, 26 Mich. 179; Emory v. Lord, 26 Mich. 431; West v. Larraway, 28 Mich. 464; Ross v. Walker, 31 Mich. 120; Gillam v. Boynton, 36 Mich. 236; Jenne v. Marble, 37 Mich. 319; Kitchell v. Midgett, 37 Mich. 81; Carley v. Fox, 38 Mich. 387; Johnson v. Sutherland, 39 Mich. 579; Russell v. Sav. Bank, 39 Mich. 671; Gantz v. Toles, 40 Mich. 725; Insurance Co. v. McClellan, 43 Mich. 564, 6 N. W. 88; Buhler v. Jennings, 49 Mich. 538, 14 N. W. 488; Edwards v. McEnhill, 51 Mich. 166, 16 N. W. 322.

[14] Speier v. Opper, 73 Mich. 39, 40 N. W. 909.

[15] Bassett v. Shepardson, 52 Mich. 3, 17 N. W. 217; Artman

Endorsement by a married women of a note due to her, as security for the debt of a corporation in which she holds stock, will transfer the property in the note,[16] but does not make her personally liable as endorser of the note.[17]

## §165. Same Subject Continued.

The test of the competency of a married woman to make an executory contract which will make her personally liable, is whether or not it relates to and deals with her sole property. If it does, she is held liable; if it does not, she is incapable of binding herself by it.[18]

A married woman is not liable for the payment of a note executed by her and her husband for the purchase of land deeded to them jointly. In such a case the wife has no such separate interest in an estate by entirety as would afford a valid consideration for her note. Nor is her separate estate liable on such a note after her death.[19]

A wife is not liable on a note given by her jointly with her husband for the price of a horse purchased by both. The horse being purchased and being owned jointly by the husband and wife, the effect of the undertaking of the wife in such a case would be to make her surety for her husband for at least one half of the note if her undertaking is binding.[20]

It is not enough to charge a married woman upon her executory contract that there is a consideration for it which would support a promise at the common law, or that the contract incidentally inures to her benefit.[21]

## §166. Authority of Husband as Agent of Wife.

When a husband goes on and makes valuable improvements on land purchased by his wife on a contract, relying on the wife's purchase, in a suit by her for specific performance of

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v. Ferguson 73 Mich. 146, 40 N. W. 907.

[16] Watson v. Thurber, 11 Mich. 457.

[17] Russell v. Peoples' Sav. Bk., 39 Mich. 671; Hepburn v. Warner, 112 Mass. 267.

[18] Russell v. Peoples' Sav. Bk., 39 Mich. 674; Doan v. Feather's Estate, 119 Mich. 691, 78 N. W. 884.

[19] Doan v. Feather's Est., 119 Mich. 691, 78 N. W. 884.

[20] Caldwell v. Jones, 115 Mich. 129, 73 N. W. 129.

[21] Russell v. Sav. Bank, 39 Mich. 679, 33 Am. R. 444; Speier v. Opper 73 Mich. 35, 40 N. W. 909, 16 Am. St. R. 556; Artmand v. Ferguson, 73 Mich. 146, 40 N. W. 907, 16 Am. St. R. 572; Bassett v. Shepardson, 52 Mich. 3, 17 N. W. 217; Curtis v. Trowe, 74 Mich. 99, 41 N. W. 876.

the land contract, she should have the benefit of such improvement the same as though they had been paid for in whole or in part by herself.[22]

Where a husband authorized to sell his wife's goods for cash, sells them for a cash payment in part and the balance on time, no title passes to the purchaser as against an attachment subsequently levied by creditors of the wife, and her subsequent ratification is ineffectual to convey title to such purchaser.[23]

A husband acting as his wife's agent in purchasing a mortgage and collecting the amount due thereon has no implied authority to compromise a claim against the assignor on the covenant of indebtedness contained in the assignment.[24]

A mere statement of a husband that he is authorized to act as agent for his wife is insufficient to prove his authority.[25]

## §167. Rights of Husband's Creditors as against the Wife.

Where one who has refused to sell to a husband because he did not think it safe to trust him is willing to sell to the wife on credit, trusting to the property in her hands and to her honesty in making it available for his protection, and makes the sale to her in good faith, the title to the property will not pass, contrary to the intent of both parties, to the husband for the benefit of his creditors who could neither be wronged by any sale to her nor have any right to insist on a sale to the husband.[26]

A wife, by allowing her husband to pay a portion of his debt with her money, does not thereby make herself liable to pay the remainder of the debt.[27]

Where there is evidence justifying the inference that the husband has mingled his own money with that of his wife, with her knowledge and consent, with the understanding that the entire fund should be treated as his own, such fund is subject to garnishment for his debt.[28]

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[22] Murphy v. Stover, 47 Mich. 522, 11 N. W. 358.

[23] Newbern v. Wood, 52 Mich. 610, 18 N. W. 382.

[24] Eaton v. Knowles, 61 Mich. 625, 28 N. W. 740.

[25] Just v. State Sav. Bk., 132 Mich. 600, 94 N. W. 200.

[26] Rankin v. West, 25 Mich. 195.

[27] O'Donnell v. Grey, 99 Mich. 534, 58 N. W. 475.

[28] McIntyre v. Farmer's and Merchant's Bk., 115 Mich. 255, 73 N. W. 233.

## §168. Improvements and Materials Furnished to Husband to be Used on Land of Wife.

When improvements are made and materials furnished therefor, to be used on land owned by the wife, and all bills are made out to the husband and payments made by him, and no particular direction or oversight is made by the wife, other than that natural for a wife as to the house of her husband, she cannot be held liable for any portion of such improvements and material.[29]

A married woman is not personally responsible, and her land is not bound, for improvements and expenditures made on it by her husband, where no credit has been given to her, and where he has not contracted on her behalf.[30]

In an action against a married woman for repairs on her house, proof that plaintiff obtained judgment against her husband is conclusive evidence that plaintiff looked to him as the debtor.[31]

But there are cases where a married woman may be held liable for improvements made on her land by her husband where she has made no express contract. Her husband may act as her agent, and bind her so far as he acts within the scope of his authority as such agent.

Where buildings are erected on the land of a married woman with her knowledge and consent, from materials selected by her, she is liable for the value of the materials furnished, though the business was conducted mainly by her husband, and the person furnishing the materials supposed they were being furnished to him and that he owned the property.[32]

## §169. Necessaries and Family Expenses.

While it is the duty of the husband to support his wife and family, still a wife may make herself personally responsible for family necessaries. If she buys the goods herself and agrees to pay for them she is personally liable regardless of the use to which she intends to put them.

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[29] Newcomb v. Andrews, 41 Mich. 518, 2 N. W. 672.

[30] Morrison v. Berge, 42 Mich. 393, 4 N. W. 731; Newcomb v. Andrews, 41 Mich. 518, 2 N. W. 6672; Emory v. Lord, 26 Mich. 431; Williams v. Magoon, 30 Mich. 273; Holmes v. Brunson, 43 Mich. 562, 6 N. W. 89; Vanneman v. Powers, 56 N. Y. 39; Woodruff Iron Wks. v. Adams, 37 Conn. 233; Wright v. Hood, 49 Wis. 235.

[31] McCausland v. King, 60 Mich. 70, 26 N. W. 830.

[32] Popp v. Connery, 130 Mich. 84, 101 N. W. 54; Frolich v. Carroll, 127 Mich. 561, 86 N. W. 1034.

Even where a married woman who owns a separate estate is residing with her husband, whose duty it is to furnish the necessaries for his family, she can make herself personally liable for family necessaries purchased by herself, on her individual credit and sole agreement to pay for them.

The liability of the wife is consequent upon her obtainment of the goods on her sole credit and individual promise to pay for them contemporaneous with such obtainment, and is not conditional upon nor affected by the kind of use to which the goods are subsequently put.[33] And her personal liability to the vendor is not contingent upon her ownership of other separate estate, nor on the character of the goods bought, nor the nature of their immediate or ulterior disposition; but it exists, if at all, when the property is obtained on her exclusive credit and individual agreement. Her promise to pay for the property is a promise to pay for her separate property, and therefore one which she is competent to make.[34]

### §170. Necessaries and Family Expenses Continued.

A married woman whose husband has transferred to her their homestead and the personal property about the house, and agrees to pay her one hundred dollars per year during her life in consideration of the release of dower and all claims present and future to his property, may bind herself by a contract for the employment of a nurse for herself, although her husband is still living with her.[35]

### §171. Married Woman's Subscription Contract for Public Improvements.

The subscription contract of a married woman to a fund for the purpose of securing the location of a business block in the vicinity of property owned by her is not within the power to contract conferred by the married women's act of 1855, although her property is incidentally benefited by the improvement. An incidental benefit to her property is not sufficient. The test of competency is whether or not the contract deals with the married woman's separate estate.[36]

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[33] Tillman v. Shackelton, 15 Mich. 447; Campbell v. White, 22 Mich. 185; Darby v. Callaghan, 16 N. Y. 71; Knapp v. Smith, 27 N. Y. 277; Draper v. Stowell, 35 N. Y. 507.

[34] Campbell v. White, 22 Mich. 185; Stuart v. Jenkins, 6 Allen (Mass.) 300; Larrabee v. Colby, 99 Mass. 559.

[35] Barber v. Eberle's Est. 131 Mich. 317, 91 N. W. 123; Herschfield v. Baldwin, 83 Mich. 116, 47 N. W. 239; Meads v. Martin, 84 Mich. 306, 47 N. W. 583; Goodman v. Shipley, 105 Mich. 439, 63 N. W. 412; Foster v. Felcher, 119 Mich. 353, 78 N. W. 120.

### §172. Contract of Married Women Jointly with Husband.

A married woman is not liable on a contract signed by her with her husband for property purchased and owned by them jointly.

Such contract is not in relation to her separate estate, nor can she be made liable for the purchase of property to be owned by herself and another jointly.[37]

For her sole benefit, or that of her separate estate, a married woman may contract jointly with her husband and become personally liable under the statute; but if the contract is for the benefit of the husband, or for the benefit of the husband and wife jointly, she is not liable.[38]

A joint contract by husband and wife for family necessaries will be regarded as a contract of the husband only.[39]

A married woman is liable on a bond executed by herself and husband jointly for money borrowed by her and used by her to build on her own land.[40]

A note given by a married woman to prevent an attempt to collect a note of her husband of the same amount, by attacking the transfer by him to her of all his property under the claim that such transfer is fraudulent as to creditors, is valid against the wife.[41]

### §173. Debts Incurred by Married Woman in her Separate Business.

A married woman who takes from her husband a deed of land previously leased by him, and so succeeds him as lessor, is liable for work and materials furnished by the lessee at the request of her husband, acting as her agent, after she acquires the property, less any sum paid by the husband; but not, however, if the work and material was furnished the husband on his own account, or under his express promise as principal.[42]

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[36] Russell v. Bank, 39 Mich. 671, 33 Am. R. 444; Chamber of Commerce v. Goodman, 110 Mich. 498, 68 N. W. 295, Moore & Grant JJ., dissenting.

[37] Doane v. Feather's Est., 119 Mich. 691, 78 N. W. 884.

[38] 21 Cyc., 14-56; Barber v. Hoover, 120 Ind. 193, 28 N. E. 888; Verill v Parker, 65 Me. 578; King v. Page, 119 Wis. 105, 95 N. W. 108.

[39] 21 Cyc., 14-56; Berger v. Clark, 79 Pa. St. 340; Park v. Cleaver, 37 Pa. St. 251; Moore v. Joyce, 161 Pa. St. 138, 28 Atl. 1080; Collins v. Hall, 55 S. C. 336, 33 S. E. 466.

[40] Wilson v. Wilson Est., 80 Mich. 472, 45 N. W. 184.

[41] Harris v. Gates, 121 Mich. 163, 79 N. W. 1098; Whelply v. Stoughton, 112 Mich. 594, 70 N. W. 1098.

A married woman may constitute her husband her agent to carry on business for her in her name. Evidence that a husband deeded his farm to his wife, and from that time the business was carried on by the wife, and the bank account growing out of the business was kept in her name, tends to show that a note given by her for over-draft of her bank account relates to her separate estate.[43]

## §174. Debts Contracted on Credit of Wife's Separate Estate.

A married woman to whom a loan is made on her husband's representation, in her presence, that it is for the benefit of her separate property, and is so understood by her and believed and relied on by the lender in good faith, is liable, though no part of the money was in fact so used.[44]

It being conceded that a married woman is liable for debts contracted by her for the benefit of her separate estate, the question often arises as to what contracts are for its benefit. Among the contracts generally held to be for the benefit of wife's separate estate may be enumerated the following: reasonable hire of servants for the care of her property,"[45] labor employed in the cultivation of her land;[46] purchase of animals, material, tools, or machinery furnished for use on her farm;[47] labor and materials furnished for the improvement and repair of her separate property;[48] money borrowed to pay off a mortgage or other incumbrance upon her separate property.[49] So a covenant to support a person who conveys property to a married woman is for the benefit of her separate estate.[50]

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[42] Lubebe v. Thorp, 94 Mich. 268, 54 N. W. 41.

[43] Bank v. Newton, 117 Mich. 433, 75 N. W. 934.

[44] Vosburgh v. Brown, 119 Mich. 697, 78 N. W. 886; McVey v. Cantrell, 70 N. Y. 295, 26 Am. R. 605.

[45] Walker v. Smith, 28 Ala. 569; Sanderlin v. Sanderlin, 122 N. C. 1, 29 S. E. 55.

[46] Moshier v. Kittle, 101 Mich. 345, 59 N. W. 497; Botts v. Knabb, 116 Pa. St. 28, 9 Atl. 33.

[47] Mitchell v. Smith, 32 Ia. 484; Batchelder v. Sargent, 47 N. H. 262; Arrington v. Bell, 94 N. C. 247; McCormick v. Holbrook, 2 Ia. 487.

[48] Henry v. Blackburn, 32 Ark. 445; Schnabel v. Betts, 23 Fla. 178, 1 So. 692; Colvin v. Currier, 22 Barb. (N. Y.) 371.

[49] Daniels v. Royce, 96 Ga. 566, 23 So. 493.

## §175. Contracts for Benefit of Wife's Separate Estate.

Under our present system, whatever contract a married woman is legally competent to make may be made "with the like effect as if she was unmarried."[51]

But the statute does not confer upon her a general capacity to make contracts. She can make only such contracts as relate to her own property, and in that respect she has the same legal capacity as a man.

The contract of a married woman may relate to her separate property, although such property is not in any way benefited by it. If she mortgages her separate property to secure the debt or obligation of her husband, or of any other person, the property mortgaged is bound by the contract, but she cannot be held personally liable for the deficiency if the property mortgaged is not sufficient to pay the debt.[52] A conveyance by mortgage of her separate property comes clearly within the power given a married woman by the statute, and she must judge for herself whether or not it is for her interest to give it.[53]

Where a married woman gives her promissory note for the debt of another person, and secures the payment of the note by a mortgage on her separate property, the note is void, but the mortgage is valid to the extent of the property covered by it.[54]

There is no restriction under the constitution and statutes of this state which will prevent a married woman from creating an express lien on her property for any lawful purpose that could be the foundation for such action by an unmarried woman or a man. In such a case, while the contracting of an express lien against her individual property may not be for her benefit or the benefit of her separate property, it is such a contract as the statute expressly empowers her to make "with the like effect as if she was unmarried."

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[50] Houghton v. Melburn, 54 Wis. 554, 11 N. W. 517, 12 N. W. 23.

[51] C. L. '15, (11485); Howell, 2nd. Ed., §11545.

[52] Damon v. Deeves, 57 Mich. 247, 23 N. W. 798.

[53] West v. Laraway, 28 Mich. 464; Russell v. Peoples' Sav. Bank, 39 Mich. 671; Tillman v. Shackelton, 15 Mich. 447; Watson v. Thurber, 11 Mich. 457; Frakee v. Downer, 35 Mich. 151; Wineman v. Phillips, 93 Mich. 223, 53 N. W. 168.

[54] Damon v. Deeves, 57 Mich. 247, 23 N. W. 798.

Where the contract of a married woman is directly for the benefit of her separate property, she may not only create a lien on such property, but may make herself personally liable the same as an unmarried woman or man.

Where a debtor voluntarily conveys all of his property to his wife, and the wife, to relieve herself from the attack of creditors on property so conveyed, gives her individual note for her husband's debt, it is for the benefit of her separate property and she is personally liable on the note.[55] When the note was given the property conveyed was the separate property of the wife under a deed, valid as against the husband, and hence the giving of the note by the wife to relieve the property from the attack of creditors was directly for the benefit of her separate property.

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[55] Whelpley v. Stoughton, 112 Mich. 594, 70 N. W. 1098.

## CHAPTER XVIII.

## CONVEYANCES AND CONTRACTS TO CONVEY REAL ESTATE OR PERSONAL PROPERTY.

§176. Statutory Provisions.
§177. Consideration.
§178. Joinder of Husband.
§179. What Law Governs.
§180. Gift by Wife to Husband.
§181. Covenants on the Part of a Married Woman.
§182. Consent of Husband to Sale of Wife's Property.
§183. Same Subject Continued.
§184. Conveyance of Husband or Wife to or for Each Other.
§185. Conveyance of Undivided One-Half Interest by Husband to Wife.
§186. Conveyance of Land Held by Husband and Wife by Entirety.

### §176. Statutory Provisions.

The married women's act of 1855 belongs to a class of remedial statutes, and as such has always been liberally construed. Contracts made by married women for the purchase of property on credit have been sustained, where the credit was given to the wife alone, although, perhaps, they might not come strictly within the terms of the statute. The statute expressly provides that all real and personal property of a married woman "may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her, in the same manner and with the like effect as if she were unmarried." [1]

While the statute does not expressly state that such property may be "bought by her" in the same manner and with the like effect as if she were unmarried, a construction which would exclude her from such privilege would violate the time-honored rule that remedial statutes must be liberally construed.[2]

### §177. Consideration.

The payment of a husband's debt is a sufficient consideration for a deed by his wife. It is competent for a married woman to deed her property to whom she chooses, and, though it is security for or in payment of her husband's debt, the deed is valid.[3]

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[1] C. L. '15, (11485); Howell, 2nd. Ed., §11545.

[2] DeVires v. Conklin, 22 Mich. 259; Tillman v. Shackelton, 15 Mich. 447; Burdeno v. Amperse, 14 Mich. 97.

## §178. Joinder of Husband.

A married woman who is a guardian can convey the real estate of her ward without her husband joining in the deed.[4] A married woman may convey land owned by her in fee, but occupied by herself and husband as a homestead, without the husband joining the deed of conveyance. The constitution and the married women's act of 1855 confer upon married women such absolute right to the disposition of their own separate property that she may convey such homestead by deed, without the husband joining in the instrument.[5]

## §179. What Law Governs.

The disposal of the separate real estate of a married woman may be valid under the law of the state where the property is situated, although she may be incapacitated to make such conveyance by the laws of her domicile.[6]

With reference to the transfer of the personal property of a married woman, the law of the state where the contract is made applies.[7]

## §180. Gift by Wife to Husband.

A wife may make a gift of her property to her husband; but when he claims that a gift has been made, the burden of proof is upon him to establish it.[8]

But a gift or a purchase from a wife to her husband or from a husband to his wife, must be established by evidence other than that of use and possession by permission. So held where the action was between the administrator of a deceased wife's estate and the husband.

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[3] Le May v. Wickert, 98 Mich. 628, 57 N. W. 827; Keildsen v. Blodgett, 113 Mich. 655, 72 N. W. 9; Pratt Land Co. v. McClain, 135 Ala. 452, 33 So. 185, 93 Am. St. 35; Collins v. Wassell, 34 Ark. 17; Nichols v. Hayes, 20 Ind. App. 369, 50 N. E. 768; Stone v. Montgomery, 35 Miss. 83; Sapiro's Appeal, 108 Pa. St. 377; Steinnegar v. Steinnegar, 55 S. C. 9, 33 S. E. 15; Booker v. Wingo, 29 S. C. 116, 7 S. E. 49.

[4] Palmer v. Oakley, 2 Doug. (Mich.) 433, 47 Am. Dec. 41.

[5] Buckingham v. Buckingham, 81 Mich. 89, 45 N. W. 504.

[6] 21 Cyc. 1499; Thompson v. Kyle, 39 Fla. 882, 23 So. 12, 63 Am. St. R. 193.

[7] 21 Cyc. 1499; Clanton v. Barnes, 50 Ala. 260; Drake v. Clover, 30 Ala. 382.

[8] Derfy v. McClurg, 6 Mich. 223; Plumman v. Perce, 9 Mich. 509; Wales v. Newbold, 9 Mich. 45; Jenne v. Marble, 37 Mich. 319.

Under the married women's act of 1855 the property of the wife cannot become the husband's by user, or by the simple possession of it by him. The object of the statute was to prevent such results and to abolish the common law rule respecting the marital rights of the husband over the wife's property.[9]

A husband cannot acquire the property of his wife except by gift or purchase any more than he can that of any other person. Such gift or purchase cannot be established by evidence of use and possession alone.[10]

## §181. Covenants on the Part of a Married Woman.

Any covenant on the part of a married woman, in a deed for a conveyance of land that is not her individual property, is void, and any covenant in which she joins with her husband is void as to her, leaving it the sole covenant of the husband.[11]

## §182. Consent of Husband to Sale of Wife's Property.

Prior to the passage of the married women's act of 1855 it was held that the constitutional provision which enables a married woman to "devise or bequeath" her property as if she were unmarried, could not be construed to authorize her to sell and dispose of such property without the consent of her husband.[12] This decision appears to have been based upon the ground that while the constitution expressly empowers a married woman to "devise and bequeath" her property as if she were unmarried, it does not in terms authorize her to sell and dispose of it during coverture, and that, had it been intended to enable her to do so, the framers of the constitution would have manifested such intent in express terms. The same case also held that the rule that a statute in contravention of the common law ought not to be extended by construction applies equally to a constitutional provision of this character.

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[9] White v. Zane, 10 Mich. 333.

[10] Wales v. Newbold, 9 Mich. 45.

[11] Hovey v. Smith, 22 Mich. 170.

[12] Brown v. Fifield, 4 Mich. 322.

### §183. Same Subject Continued.

The facts upon which the foregoing case was based, however, arose before the passage of the married women's act of 1855, which does expressly authorize a married woman to sell her separate property during coverture without the consent of her husband. Later cases have held that the statute, as well as the constitution, is remedial and should be liberally construed, practically overruling the case above cited, which placed a strict construction on the constitutional provision.[13]

### §184. Conveyance of Husband or Wife to or for Each Other.

The exemption of household property from sale or mortgage without the consent of the wife, and the interest in such property which the marital relation and the statute create, do not prevent a division of the property by the husband and wife, nor a sale or release of her interest by the wife to the husband.[14]

A conveyance of land made by a husband to his wife without consideration, no fraud being shown, will not be rescinded because the wife subsequently deserts him and refuses to return to him, when the husband is himself to blame for such desertion and refusal to return.[15]

### §185. Conveyance of Undivided One-Half Interest by Husband to Wife.

A conveyance by a husband to his wife of an undivided one-half interest in land owned by him does not create such an estate that on the death of her husband the surviving wife will take the whole, even although it is expressly stated in the deed of conveyance that the purpose of it is to convey to the wife such an interest in the land that the parties thereto will have an estate in entirety, and that the same shall survive and vest in the survivor as a full and complete estate. At common law, in order to create an estate by entirety, there must be unity of time, title and possession, and such common law rule has not been changed by statute.[16]

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[13] DeVires v. Conklin, 22 Mich. 259.

[14] Carpenter v. Carpenter, 154 Mich. 103, 117 N. W. 598.

[15] Purcell v. Purcell, 162 Mich. 404, 127 N. W. 310; Whipfler v. Whipfler, 163 Mich. 18, 116 N. W. 544, 16 L. R. A. 113, 117 N. W. 213.

[16] Pegg v. Pegg, 165 Mich. 228, 130 N. W. 617.

## §186. Conveyance of Land Held by Husband and Wife by Entirety.

Where land is held by husband and wife as an estate by entireties, neither can convey his or her interest therein. Both must join in order to divest either of the title.[17] Where a wife gave a quit-claim deed of her interest in land held by herself and husband jointly as tenants by entireties, and received a cash payment therefor from the grantee, it was held that no title passed to the grantee, nor could he claim a lien on the land for the money paid. The grantor at the time that she gave the deed had no title or interest which she could convey or encumber in any way.

But in such a case, where the grantor filed a bill in chancery against her grantee after her husband's death to remove the cloud upon her title, it was held that while her quit-claim deed passed no title and created no equitable lien which could be enforced by the grantee for the money which she had paid, still, as a condition to granting the relief prayed, the grantor must pay back the money which she had received for her quit-claim deed, with interest, in accordance with the familiar rule that he who seeks equity must do equity.[18]

While it is the general rule, and has been uniformly held in this state, that a married woman cannot be held personally liable on her covenant in a deed or mortgage made jointly by herself and her husband, she is liable jointly with her husband where she receives the entire consideration for which the deed is given. In such a case the wife's covenant is not as surety for her husband, but she is contracting for property which is to be held and owned by her as her separate estate.[19]

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[17] Ernst v. Ernst, 178 Mich. 100, 144 N. W. 513; Vinton v. Beamer, 55 Mich. 559, 22 N. W. 40; Louis Appeal, 85 Mich. 340, 48 N. W. 580; Naylor v. Minnock, 96 Mich. 182, 55 N. W. 664, 35 Am. St. 594.

[18] Ernst v. Ernst, 178 Mich. 100, 144 N. W. 513.

[19] Arthur v. Caverly, 98 Mich. 82, 56 N. W. 1102.

# CHAPTER XIX

## ACTIONS

§187. Statutory Provisions.
§188. Rights of Action between Husband and Wife.
§189. Action by a Married Woman against a Firm of which her Husband is a Member.
§190. Actions by Wife against Husband.
§191. Actions for Torts.
§192. Action by Wife for Services.
§193. Action by Wife for Alienation of Husband's Affections.
§194. Same Subject:—Michigan Statute.
§195. Same Subject Continued.
§196. Actions by Husband for Alienation of Wife's Affection.
§197. Evidence in Action for Alienation of Affections.

### §187. Statutory Provisions.

A sewing machine, though exempt from levy and sale on execution,[1] is not covered by the ninth subdivision of C. L. '15, (12858); Cummins & Beecher's Judicature Act, §891. which declares that any chattel mortgage, bill of sale, or other lien created on any part of the property mentioned in said Section 12858, except subdivision 8, shall be void unless signed by wife.

Section 8692, C. L. '97 (Howell, 2nd Ed. §11547), which authorizes a married woman to sue in her own name for exempt property seized on execution against her husband, applies only where property is taken by some process adversary to the husband. It does not include voluntary sales made by the husband, but includes cases only where the property is taken by some process adverse to his interest.[2]

### §188. Rights of Action between Husband and Wife.

It has never been held in Michigan that a husband and wife may contract generally with each other so as to give one a right of action against the other in all cases. The married women's act of 1855 does not abrogate all of the common law rules or previous statutes restraining married women from making contracts, nor does it profess to change the powers of husband and wife to deal with each other, except so far as such change is implied. It gives the wife no power to contract, except in regard to her separate estate. A husband cannot sue his wife either at law or in equity to enforce a purely executory contract. The constitution and statute are clearly and plainly against her right to make a mere personal obligation unconnected with her separate property and not charging it in any way.[3]

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[1] C. L. '97, (10359); Howell, 2nd. Ed., §13056, repealed by the Judicature Act.

[2] Singer Mfg. Co. v. Cullaton, 90 Mich. 639, 51 N. W. 687.

### §189. Action by a Married Woman against a Firm of which her Husband is a Member.

A married woman may maintain an action at law against the firm of which her husband is a member. The fact that the obligation upon which suit is brought is a joint obligation of the husband and others does not deprive the wife of her remedy in a court of law.[4]

Where a wife sues the firm of which her husband is a member, impleading him as a defendant, and calls him as a witness in her behalf, his consent to her testifying for herself and against him as a defendant is presumed if he is present in court and makes no objection.[5]

But if the wife is not present in court, the failure of her attorney to object to the testimony of her husband against her cannot be treated as the consent of the wife.[6]

### §190. Actions by Wife against Husband.

Where a wife is living separate and apart from her husband, and he has in his possession personal property belonging to her, she may maintain an action of replevin against him for such property if he refuses to deliver it to her on demand.[7]

A wife may sue her husband for money which she loans him to use in his business.[8]

A husband may secure an injunction restraining his wife from running a business in competition with him and his business.[9]

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[3] Jenne v. Marble, 37 Mich. 319; DeVires v. Conklin, 22 Mich. 255; West v. Laraway, 28 Mich. 464; Emory v. Lord, 26 Mich. 431; Lapworth v. Leach, 79 Mich. 16, 44 N. W. 338.

[4] Moore v. Foote, 34 Mich. 443; Osborne v. Osborne, 36 Mich. 48; Benson v. Morgan, 50 Mich. 77, 14 N. W. 705.

[5] Benson v. Morgan, 50 Mich. 77, 14 N. W. 705.

[6] Hubbell v. Grant, 39 Mich. 641.

[7] White v. White, 58 Mich. 546, 25 N. W. 490.

[8] Letts v. Letts, 73 Mich. 138, 41 N. W. 99.

## §191. Actions for Torts.

At common law neither husband nor wife can bring an action against the other for purely personal torts.[10] And, unless expressly authorized so to do by statute, no action can be maintained by either husband or wife against the other for injury to the person or character. Thus it has been held that the wife cannot sue her husband for slander,[11] nor for assault and battery.[12]

The dissolution of the marriage by absolute divorce does not permit the wife to sue her husband or the husband to sue his wife for a tort committed upon him or her before the dissolution of the marriage.[13]

Under the married women's act, however, a wife may sue her husband for wrongs done her separate property by him.[14] She may bring replevin against her husband,[15] and the husband may also bring replevin against his wife.[16] Either the husband or wife may sue the other in trover for conversion.[17]

A husband cannot maintain a suit against his wife for damages for deceit practiced by her against him by which he was induced to marry her.[18] But where a man was induced to marry a woman by false representations made to him by one who knew that she was pregnant, and the man making such false representations was the author of such pregnancy, while the husband cannot maintain an action against his wife for her deceit, he can maintain an action against the man whose false representations induced him to consummate the marriage.[19]

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[9] Root v. Root, 164 Mich. 638, 130 N. W. 194.

[10] 21 Cyc. 1519.

[11] Fratley v. Fratley, 42 Barb. (N. Y.) 641.

[12] Abbott v. Abbott, 67 Me. 304, 24 Am. R. 27; Schultz v. Schultz, 89 N. Y. 644.

[13] 21 Cyc. 1520; Peters v. Peters, 42 Ia. 182; Libby v. Berry, 74 Me. 286, 43 Am. R. 589; Abbott v. Abbott, 67 Me. 304, 24 Am. R. 27; Lougardyke v. Lougardyke, 44 Barb. (N. Y.) 366; Nickerson v. Nickerson, 65 Tex. 281.

[14] Chestnut v. Chestnut, 77 Ill. 346; Larison v. Larison, 9 Ill. App. 27.

[15] Jones v. Jones, 19 Ia. 236; White v. White, 58 Mich. 546, 25 N. W. 490.

[16] Carney v. Gleissner, 26 Wis. 493, 22 N. W. 735.

[17] Whitney v. Whitney, 49 Barb. (N. Y.) 319; Ryerson v. Ryerson, 8 N. Y. Supp. 738.

[18] Kujeck v. Goldman, 150 N. Y. 179, 44 N. E. 733, 55 Am. St. R. 670, 34 L. R. A. 156.

[19] Kujeck v. Goldman, 150 N. Y. 176, 34 L. R. A. 156.

### §192. Action by Wife for Services.

The legal presumption is that the services of a wife are given for the benefit of her husband and in his interest; and where she is working with her husband, if she makes a separate claim for her individual services, she must not only show that her services were given with the consent of her husband, but that the party for whom her services were rendered so understood it.[20]

When the husband supports the family, his wife cannot maintain an action for her services without proof of the husband's consent and of his relinquishment to her of his rights to her services.[21]

### §193. Action by Wife for Alienation of Husband's Affections.

The right of a married woman to maintain an action for alienation of her husband's affections has been seriously questioned in the past.

In the adjudicated cases there seems to be a difference of opinion as to her common law rights to maintain such action. It has been contended, and some courts have held, that as the wife had no right of property at common law in any damages recovered on her account, for any cause, she could have no right of action to recover such damages.[22]

In New York it is held that it was considered at common law that damages for personal injuries belong to the wife, because the husband could not sue without joining her. If the damages were recovered before the death of the husband, the money collected became his property; but if he died before the action was determined, the right of action survived to the wife. From this it was deduced that the right of action belonged to the wife.[23] This would seem to be a correct position, because it could hardly be contended that the husband could maintain an action for his own wrongful act.

### §194. Same Subject:—Michigan Statute.

The question of a right of a married woman to maintain an action for damages for the alienation of her husband's affections was first raised in Michigan in the case of Mitchell v. Mitchell, 49 Mich. 68, 12 N. W. 914. In that case the plaintiff charged the defendant, who was the father of her husband, with persuading the latter to desert her, and with contriving to alienate and destroy his affection for her. On the trial the circuit judge directed a verdict for the defendant. The case was appealed to the supreme court and the judgment of the lower court affirmed by equal division. No opinion was filed and the case does not seem to have been considered as an adjudication of the question.

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[20] Mason v. Dunbar, 43 Mich. 407, 5 N. W. 432; Herall v. McCabe, 171 Mich. 530, 137 N. W. 237.

[21] Barnes v. Moore, Estate, 86 Mich. 585, 49 N. W. 585.

[22] Duffies v. Duffies, 76 Wis. 374, 45 N. W. 523; Westlake v. Westlake, 34 Ohio St. 621; Doe v. Roe, 82 Me. 503, 20 Atl. 83; Logan v. Logan, 77 Ind. 558; Mehroff v. Mehroff, 26 Fed. 13.

[23] Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 171.

It has been held, however, that a married woman may maintain an action in her individual name, without joining her husband, where an assault and battery is committed on her,[24] and for slander,[25] and in such cases the damages recovered become her individual property; and there would seem to be no good reason for denying her the same rights where by the wrongful act of another she is deprived of the affection, society and support of her husband. Among the reasons given in those cases which hold that at common law a wife cannot maintain an action for alienation of her husband's affections, or for the consequent loss of his society, is the wife's lack of any property right in the affection and companionship of her husband, and her incapacity to sue alone, and because the husband should not be permitted to join with her to redress a wrong in which he participated.

It has been contended, however, and it would seem with good reason, that in respect of conjugal society and affection, the husband owes to the wife all that she owes to him, and that upon principle the wife's right to the companionship and affection of her husband is a property right, and as valuable to her as is the husband's right to him.[26]

## §195. Same Subject Continued.

Whatever may have been the common law rule, however, under the authority of the Michigan statute and modern legislation generally, enabling married women to sue generally and securing to them their separate property rights, the wife may sue for the alienation of the husband's affection and the loss of his society.[27] In Michigan the right of a married woman to maintain an action for damages for the alienation of her husband's affection, and for consequent loss of support and maintenance, is no longer open to question.[28]

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[24] Berger v. Jacobs, 21 Mich. 215.

[25] Leonard v. Pope, 27 Mich. 145.

[26] 21 Cyc. 1617 and cases cited.

[27] Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847; Williams

### §196. Action by Husband for Alienation of Wife's Affection.

The right of a husband to maintain an action for alienation of his wife's affection and for damages for the loss of her society and services is recognized both at common law and under the statute of several states relating to the rights of husband and wife. All of the cases which deny this right to the wife, as well as most of those which recognize and enforce such right, maintain a right of action in the husband.

### §197. Evidence in Action for Alienation of Affections.

By the common law a wife is absolutely incompetent as a witness for or against her husband, but the rule has been modified by statute so far as to make her competent in case of his consent, and leaving him perfectly free to give or with hold such consent.

But in an action by a husband for alienation of his wife's affection, letters written by the wife, tending to show her affection for her husband, are admissible for the purpose of

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v. Williams, 20 Colo. 51, 37 Pac. 614; Betser v. Betser, 186 Ill. 537, 58 N. E. 249, 78 Am. St. R. 303, 52 L. R. A. 630; Holmes v. Holmes, 133 Ind. 386, 32 N. E. 932; Wolfe v. Wolfe, 130 Ind. 599, 30 N. E. 308; Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389, 49 L. R. A. 787; Price v. Price, 91 Ia. 693, 60 N. W. 202, 29 L. R. A. 150; Nevins v. Nevins, 68 Kan. 416, 75 Pac. 492; Deitzman v. Mullin, 108 Ky. 610, 57 S. W. 247, 50 L. R. A. 808; Rice v. Rice, 104 Mich. 371, 62 N. W. 883; Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545; Lockwood v. Lockwood, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623; Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947; Nichols v. Nichols, 134 Mo. 187, 35 S. W. 577; Clow v. Chapman, 125 Mo. 101, 28 S. W. 328, 26 L. R. A. 412; Hodgkinson v. Hodgkinson, 43 Neb. 268, 61 N. W. 577, 27 L. R. A. 120; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; King v. Hanson, —, N. Dak. —, 99 N. W. 1085; Westlake v. Westlake, 34 O. S. 621, 32 Am. R. 397; Gernard v. Gernard, 185 Pa. St. 333, 39 Atl. 884, 40 L. R. A. 549; Hestler v. Hestler, 80 Tenn. 270, 12 S. W. 446; Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075; Beach v. Brown, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114; Ashe v. Pennier, 105 Fed. 722, 44 C. C. A. 675; Waldron v. Waldron, 45 Fed. 315; Merhoff v. Merhoff, 26 Fed. 13.

[28] Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545; Rice v. Rice 104 Mich. 371, 62 N. W. 883; Metcalf v. Tiffny, 106 Mich. 504, 64 N. W. 479.

showing the state of the wife's mind and affection toward her husband.[29]

But where there is no evidence of misconduct on the part of the defendant, the state of the wife's mind and affection towards her husband is immaterial and her letters ought not to be admitted until such misconduct is shown.[30]

In an action by a husband for simply enticing away his wife, it is not competent for the plaintiff to show that the defendant has had illicit intercourse with her.[31]

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[29] Perry v. Lovejoy, 49 Mich. 529, 14 N. W. 485.

[30] White v. Ross, 47 Mich. 172, 10 N. W. 188.

[31] Perry v. Lovejoy, 49 Mich. 529, 14 N. W. 485.

# PART THREE

## DIVORCE

# PART THREE—DIVORCE.

Chapter XX. Introduction to Divorce.
Chapter XXI. Divorce Laws of Different Countries.
Chapter XXII. Causes Authorizing Divorce and the Procedure in the Different States.
Chapter XXIII. Divorce and Annulment of Marriage in Michigan.
Chapter XXIV. Causes for Divorce from Bonds of Matrimony.
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Chapter XXIX. Causes for Absolute Divorce: Continued.
Chapter XXX. Divorce from Bed and Board.
Chapter XXXI. General Provisions in Actions for Divorce and Annulment of Marriage.
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# CHAPTER XX.

## INTRODUCTION TO DIVORCE.

§198. General Views.
§199. Local Legislation.
§200. Divorce Tribunals.
§201. Legislation on the Subjects of Marriage and Divorce.
§202. Legislative Divorces.
§203. Same Subject Continued.
§204. Judicial Divorce.
§205. Limited Divorce.
§206. Moral Effects of Limited Divorce.
§207. Marriages Void without Divorce.
§208. Consent Obtained by Force or Fraud.
§209. Decrees Annulling or Affirming Marriages.

### §198. General Views.

All civilized nations have provided by law certain formal proceedings for the dissolution of the marriage relation. The necessity for this seems to be recognized everywhere. Laws on this subject constantly give rise to interesting and earnest discussion, and frequently to difficult and perplexing questions.

In the United States there is a growing and dangerous laxity in legislation as to the permanency of the marriage relation, and one does not have to seek far to find the cause.

One reason for this condition appears to be our universal tendency to greater social freedom between the sexes; and another the existence of nearly fifty independent jurisdictions, which enables people to travel from one state to another to find facilities for divorce and remarriage which the law of their own state does not afford.

Such a state of things cannot safely be favored by any public policy; but the law sometimes permits it, if for no other reason than that an adequate remedy is wanting to check or prevent the evil.

### §199. Local Legislation.

Again, there is a strong current of local legislation in this country tending to a multiplicity of causes for divorce, even down to such pretexts as incompatibility of temper. So loose and confusing are our state laws, and so different as to causes for divorce, on the subjects of both marriage and divorce, that there has grown up in all parts of the country a considerable degree of public opinion that the cause of morality would be promoted by an amendment to the federal constitution, placing the whole subject in the control of Congress, thus insuring uniform laws throughout the country.

### §200. Divorce Tribunals.

Divorce tribunals should be, and generally are, a shield to the public conscience, at least to the extent that a decree of divorce should be denied whenever there is reason to believe that there is collusion between the parties, and unless the complaining party makes out a clear case, whether the application is opposed or not.

### §201. Legislation on the Subjects of Marriage and Divorce.

Marriage, as creating the most important relation in life, and having more to do with the morals and civilization of a people than any other institution, has always been more or less subject to the control of legislative bodies. The legislature prescribes the age at which marriage may be contracted and consummated, the procedure or form essential to constitute marriage, the duties and obligations the marriage relation creates, its effects upon the property rights of the parties, present and prospective, and the acts which may constitute grounds for its dissolution.[1]

### §202. Legislative Divorces.

Unless prohibited by constitutional provisions, the legislatures of the several states may grant divorces. In Michigan, however, this power is denied to the legislature by the constitution.[2]

In 1849, the legislature of Michigan passed an act which specially authorized the Circuit Court of St. Joseph County to grant a decree of divorce to James M. Teft from his wife, Sally Teft, provided it should be made to appear satisfactorily that the said Sally Teft had been, for the term of five years preceding the time of filing the petition or bill, and still continued to be, hopelessly and incurably insane.[3] There was no general law of the state authorizing divorce on the ground of insanity, and both the constitution of 1836, which was in force when the law was enacted, and that of 1851, in force when the decree was granted, prohibited divorces by the legislature. The provision in the constitution of 1836 was: "Divorce shall not be granted by the legislature, but the legislature may by law authorize the higher courts to grant them under such restrictions as they may deem expedient."[4]

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[1] Maynard v. Hill, 125 U. S. 205, L. Ed. 657, Book 35.

[2] Const., Art. IV, Sec. 32.

[3] Laws of 1849, P. 243.

On appeal to the Supreme Court from the decree of the Circuit Court of St. Joseph County granting a decree of divorce, it was held that the statute in question was in effect the granting of a divorce by the legislature, in a particular case and for a particular cause for which no general law of the state authorized a divorce to be granted, and was therefore unconstitutional, and the decree of the lower court was reversed.[5]

The case of Teft vs. Teft, which does not appear ever to have been questioned, seems to establish the law of Michigan, ever since the formation of the state government, to be that the legislature may authorize certain courts to grant divorces generally, designate the courts to which such authority is given, and declare by general law the causes for which such courts may grant decrees of divorce.

## §203. Same Subject Continued.

But the legislature can neither grant divorces by legislative enactment, in particular cases, nor authorize the courts to do so for a particular cause, for which no general law of the state authorizes a divorce to be granted. Many of the other states have constitutional provision more or less similar to that of Michigan.

In New Hampshire it is held that a statute which attempts to confer authority upon the court to grant a divorce for matters already past, and which at the time they occurred furnished no ground for a dissolution of the marriage, or for other legal proceedings, is a retrospective law for the decision of a civil cause and therefore unconstitutional.[6]

In Illinois hereditary insanity evinced before marriage and unknown to the husband, affords no ground for divorce.[7]

In Kentucky it has been held that an act of the legislature divorcing husband and wife, acquiesced in by both parties, is not an exercise of judicial authority.[8] In Maine it is held that a divorce by act of the legislature is valid, in a case of which the courts under existing laws have no jurisdiction.[9] The same rule prevails in Maryland.[10] In Missouri a divorce by the legislature is unconstitutional.[11] In Ohio the legislature has no power to grant divorces, but to avoid rendering children of second marriages illegitimate, the courts have held legislative divorces valid.[12]

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[4] Const 1836, Art. XII, Sec. 5.

[5] Teft v. Teft, 3 Mich. 67.

[6] Clark v. Clark, 10 N. H. 380.

[7] Birkby v. Birkby, 15 Ill. 120.

In Illinois and Wisconsin the legislature is prohibited by constitutional provisions from special legislation for the granting of divorces.[13]

In Michigan legislative divorces have been prohibited in every constitution since the organization of the state government. The whole authority to grant divorces is vested in the circuit and supreme courts. Original jurisdiction is vested exclusively in the several circuit courts in chancery, with appellate jurisdiction in the supreme court.

### §204. Judicial Divorce.

A judicial divorce is the judgment or decree of a court of competent jurisdiction, wholly or partially dissolving a marriage.

A divorce may be either absolute or limited. An absolute divorce is the decree of a court of competent jurisdiction, terminating an existing marriage relation of husband and wife, freeing the parties from the marriage bond and restoring both to the status of a single person. A partial or limited divorce does not dissolve the marriage tie. It is a mere legal separation, a divorce from bed and board only, simply freeing the innocent party from the presence and control of the guilty one.

### §205. Limited Divorce.

A limited divorce neither dissolves the marriage nor gives either party the right to marry again. It does not even divest the guilty party of his or her interest as husband or wife in the estate of the other.[14] It is no defense to a civil or criminal charge of adultery, nor to an indictment for bigamy.

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[8] Cabell v. Cabell, 1 Metc. (Ky.) 319.

[9] Adams v. Palmer, 51 Maine, 480.

[10] Wright v. Wright, 2 Md. 429.

[11] Brayson v. Brayson, 17 Mo. 590; State v. Fry, 4 Mo. 120, 28 Mo. 187.

[12] Bingham v. Miller, 17 Ohio 445.

[13] Ill. Const., Art. IV, Sec. 22; Wisc. Const., Art. IV, Sec. 24.

[14] Keezer on Marriage and Divorce, Sec. 63, P. 38; Clark v. Clark, 6 Watts & S. (Pa.) 85.

After a limited divorce has been granted it is presumed that relations between the parties have ceased, and children born thereafter are presumed to be illegitimate until the contrary is shown. But, upon satisfactory proof of cohabitation after the decree is granted, they will be held legitimate.[15]

## §206. Moral Effects of Limited Divorce.

Limited or qualified divorces would seem to be somewhat hazardous to the morals of the parties. They are thrown back upon society in the undefined and dangerous characters of a husband without a wife and a wife without a husband. They may possibly secure a judicial settlement of matrimonial troubles and thus give an innocent wife protection from a cruel or drunken husband, but the same result could be obtained by absolute divorce, alimony, and a restraining order or injunction, and leave the parties in a much better position for themselves and the community.

A limited divorce or legal separation deprives the parties to the marriage of the rights of cohabitation and the precreation of legitimate children.

In speaking of divorce from bed and board Mr. Bishop says: "This proceeding, neither dissolving the marriage nor reconciling the parties, nor yet changing their natures; having at least no direct sanction from scripture; characterized by Lord Stowell as 'casting them out in the undefined and dangerous character of a wife without a husband and a husband without a wife'; by Judge Swift as 'placing them in a situation where there is an irresistible temptation to the commission of adultery unless they possess more frigidity or more virtue than usually falls to the share of human beings'; by Mr. Baueroft as 'punishing the innocent more than the guilty'; by a late English writer, as 'a sort of insult, rather than satisfaction, to any man of ordinary feelings or understanding';—is, while destitute of justice, one of the most corrupting devices ever imposed by serious natures on blindness and credulity."[16]

## §207. Marriages Void without Divorce.

Statutes of different countries sometimes provide that certain marriages are void without decree of divorce. The Michigan statute provides that all marriages which are prohibited by law on account of consanguinity or affinity between the parties, or on account of either of them having a former wife or husband then living, and all marriages solemnized when either of the parties is insane or an idiot, shall be void without any decree of divorce or other legal process, but the issue of such marriage, except where one of the parties had a lawful husband or wife living at the time the marriage was solemnized, is declared legitimate. This statute applies only to marriages solemnized in this state.[17]

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[15] 2 Bishop on Marriage and Divorce, Sec. 726-741.

[16] Bishop on Marriage and Divorce, Sec. 29.

## §208. Consent Obtained by Force or Fraud.

Statutes quite generally provide, also, that marriages solemnized when either of the parties was under the age of legal consent, if they separate during such non-age and do not cohabit together afterwards, and in cases where the consent of one of the parties was obtained by force or fraud and there has been no subsequent voluntary cohabitation of the parties, are deemed void without any decree of divorce or other legal process.[18]

## §209. Decrees Annulling or Affirming Marriages.

In those cases where the statute declares certain marriages void, or voidable, provision is usually made for proceedings to annul such marriages. It is also quite common for statutes to provide proceedings to affirm a marriage where its validity is denied or doubted by either of the parties.

There is a clear distinction between a decree of divorce and a decree of nullity. The former is the judgment of a competent tribunal dissolving a legal marriage; the latter is the judgment of a competent court declaring that the parties to the suit were never legally married, and restores each to the status of an unmarried person.[19]

[17] C. L. '15, (11392); Howell, 2nd. Ed., §11453; In re Fitzgibbons' Est., 162 Mich., 416.

[18] C. L. '15, (11393); Howell, 2nd. Ed., §11454. People v. Schoonmaker, 119 Mich. 242.

[19] Lyon v. Lyon 230 Ill., 366, 82 N. E. 850, 13 L. R. A. (N. S.) 996; Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500, 26 L. R. A. (N. S.) 179; People v. Case, 241 Ill. 279, 89 N. E. 638, 25 L. R. A. (N. S.) 578; Montague v. Montague, S. D. 471, 127 N. W. 639, 30 L. R. A. (N. S.) 745; Wilson v. Wilson, 95 Minn. 464, 104 N. W. 300; Avakian v. Avakian, 69 N. J. Eq. 89, 60 Atl. 521; Jones v. Brinsmaid, 183 N. Y. 258, 76 N. E. 22, 3 L. R. A. (N. S.) 192; Barney v. Cuness, 68 Vt. 51; Elliott vs. Elliott, 77 Wis. 63.

## CHAPTER XXI.

## DIVORCE LAWS OF DIFFERENT COUNTRIES.

§210. General Observations.
§211. Divorce Laws of British Empire.
§212. Divorce Laws of Canada.
§213. Divorce Laws of the United States.
§214. Jurisdiction Governed by Domicile.
§215. Place of Marriage not Controlling.
§216. What Constitutes Domicile.
§217. Domicile by Operation of Law.
§218. Domicile for Purpose of Divorce.
§219. Change of Domicile.
§220. Proof of Domicile.
§221. Temporary Absence as Affecting Domicile.

### §210. General Observations.

Each sovereign state of the civilized world has the power to enact laws for the regulation of the marriage or divorce of its domiciled citizens. The British Parliament has enacted marriage and divorce laws that differ materially for the different divisions of the Empire, and sole power over marriage in the Dominion of Canada was delegated to the Dominion Parliament by the law known as the British North America Act.

### §211. Divorce Laws of British Empire.

Prior to the year 1857, the ecclesiastical courts had exclusive jurisdiction to grant divorces in England and Wales. The Act of August 8, 1857 established a court for divorce and matrimonial causes, which had exclusive jurisdiction to grant divorces in England and Wales up to 1873.

In 1873, a new tribunal having jurisdiction over all divorce causes was established in England, known as the "Probate, Divorce and Admiralty Division," which now has exclusive jurisdiction to grant divorces in England. By the Act of January 1, 1871 a "Court for Divorce and Matrimonial Causes" was established for Ireland, with Catholics barred from its benefits.

This statute has since been declared unconstitutional, and an Irish marriage can be dissolved only by act of the British Parliament. In Scotland, adultery has been a ground for divorce since 1560, and desertion since 1573.

### §212. Divorce Laws of Canada.

At the time of the Confederation of the Provinces of Canada, by the law known as the "British North America Act," passed by the British Parliament in 1867, divorce courts were in existence in the Provinces of British Columbia, New Brunswick, Nova Scotia and Prince Edward Island. Under the Confederation Act the power over divorce was vested in the Dominion Parliament, which never has passed any legislation on the subject unless it has been done recently. Grave doubts have been expressed as to the power of the courts of British Columbia to hear divorce causes, and it is said that some of the judges decline to do so.

In Prince Edward Island the Lieutenant Governor and Council constitute the divorce court, and but few divorces have ever been granted in the colony. In New Brunswick and Nova Scotia the divorce courts that existed prior to the confederation are still in existence, but seldom appealed to. In the balance of the Dominion of Canada an absolute divorce can be obtained only from the Dominion Senate on the ground of adultery of either spouse, or the impotency of the husband, or where the marriage is voidable for non-consummation. The courts of the Dominion have the power to grant alimony or support to the wife on proper application.

### §213. Divorce Laws of the United States.

Under the Federal constitution the establishment of divorce laws and courts was left under the absolute control of each state, and every state in the union, except South Carolina, has established courts, procedure and grounds for divorce, which are different in each state. South Carolina has a constitutional provision prohibiting the legislature from passing divorce laws. The Congress of the United States has absolute power over divorce laws in the District of Columbia, the Phillipines, Guam, Alaska and the Canal Zone, which have no legislative bodies, and has enacted divorce laws for Alaska and the District of Columbia. The Congress has also supervisory power to say what divorce laws the territorial legislatures of Porto Rico and Hawaii shall enact.

## §214. Jurisdiction Governed by Domicile.

It is well established law that the courts of any state, nation or division thereof, however great or small, cannot divorce parties unless one of the parties to the marriage is domiciled therein. This is the reason why the divorce judgment of any state or nation, to one temporarily within its borders is worthless if granted. This would be attempting to dissolve the status of parties, neither of whom are citizens, and usurping a right which, by all statutory law and international rules and comity, belongs to the place of domicile.

## §215. Place of Marriage not Controlling.

The fact of marriage within a certain state would not, therefore, confer jurisdiction to divorce, for a lawful marriage may be solemnized in a state or nation where neither of the parties has a domicile. The commission of the act constituting ground for divorce would not confer jurisdiction, for the act might be committed by a temporary sojourner.

Domicile, therefore, is the only test of jurisdiction to divorce. It is the only jurisdiction which will be recognized internationally throughout the civilized world. Attempts to assume jurisdiction through any other medium than that of the domicile of one of the parties, has always resulted in a worthless divorce, void in the jurisdiction where it is granted, and void extra-territorially.

Statutory attempts to confer jurisdiction by reason of "residence," marriage within the jurisdiction where the suit is instituted, or the commission of the offense within the place of suit, have always resulted disastrously; and the courts of every state and nation, universally, absolutely refuse to recognize the right of any court to divorce parties, unless at least one of them was, in good faith, domiciled within the territorial jurisdiction of the court to which the application was made, and by which the judgment or decree was rendered.

Convictions of the crimes of adultery, bigamy, polygamy and unlawful cohabitation have frequently been had, of the possessors of such void decrees of divorce, and many innocent supposed wives and children have been disinherited who were dependent upon such void decree for existence.[1]

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[1] State v. Westmoreland, 76 S. C. 145, 56 S. E. 673, 8 L. R. A. (N. S.) 842; German Soc. v. Domitzer, 192 N. S. 125, 48 L. Ed. 373, 24 Sup. Ct. R. 221; McCreedy v. Davis, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655; Harding v. Harding, 198 U. S. 331, 49 L. Ed.

## §216. What Constitutes Domicile.

The domicile of a person is the place he voluntarily fixes as his residence and abode, not for a mere special or temporary purpose, but with a present intention of making it his permanent home.[2]

Other definitions are: a residence at a particular place accompanied by an intention, either positive or presumptive, to remain there permanently, or for an undefined length of time;[3] the place where a person has his true, fixed permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.[4]

Domicile and residence are not convertible terms. The former is of more extensive signification, and includes beyond mere physical presence at the particular locality, positive or presumptive proof of an intention to constitute it a permanent abiding place.[5]

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1072; Haddock v. Haddock, 201 U. S. 562, 50 L. Ed. 885, 26 Sup. Ct. R., 525; Reeves v. Reeves, 24 S. D. 435, 123 N. W. 869, 25 L. R. A. (N. S.) 574; Thelan v. Thelan, 75 Minn. 433, 78 N. W. 108; Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; Adams v. Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275; People v. Dowell, 25 Mich. 247, 12 Am. R. 260; Lawrence v. Nelson, 113 Iowa, 277; 85 N. W. 84, 57 L. R. A. 583; Rumping v. Rumping, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197; Hard v. Hard, 51 Neb. 412, 70 N. W. 1122; People v. Case, 241 Ill. 279, 89 N. E. 638, 25 L. R. A. (N. S.) 578; Hoffman v. Hoffman, 155 Mich. 328, 118 N. W. 990; Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145; Winans v. Winans, 205 Mass. 388, 91 N. E. 394, 28 L. R. A. (N. S.) 992; Watkinson v. Watkinson, 68 N. J. Eq. 632, 60 Atl. 931, 69 L. R. A. 397, 6 Am. Cases, 326; Bradfield v. Bradfield, 154 Mich. 115, 117 N. W. 588; Mohler v. Shank, 93 Iowa, 274, 61 N. W. 981, 57 Am. St. 274, 34 L. R. A. 161; In re Christensen, 17 Utah 412, 53 Pac. 1003, 70 Am. St. 974, 41 L. R. A. 504; Sammons v. Pike, 108 Minn. 291, 122 N. W. 168, 23 L. R. A. (N. S.) 1254; State v. Morse, 31 Utah 213, 87 Pac. 705, 7 L. R. A. (N. S.) 1127; Wood v. Wood, 59 Ark.

[2] 14 Cyc., 833.

[3] Merrill v. Morsett, 76 Ala. 433-437; Littlefield v. Brooks, 50 Me. 475-477; Stout v. Leonard, 37 N. J. L. 492-495; State v. Borden town, 32 N. J. L. 192; Cadwalader v. Howell, 18 N. J. L. 138; Mitchell v. U. S., 21 Wall. (U. S.) 350, 22 L. Ed. 584; Chambers v. Prince, 75 Fed. 176.

[4] Story Confl. of Laws, Sec. 41; Smith v. Croon, 7 Fed. 81, 152; Hayes v. Hayes, 74 Ill. 312, 314; Hairston v. Hairston, 27 Miss. 704, 718, 61 Am. Dec. 530; Hart v. Lindsey, 17 N. H. 235, 243.

[5] Krone v. Cooper, 43 Ark. 547; Salem v. Lynn, 29 Conn. 74; Tazewell v. Davenport, 40 Ill. 179; Savage v. Scott, 45 Iowa 130; Cohen v. Daniels, 25 Iowa 88; Love v. Cherry, 24 Iowa 204; Keith v. Stetter, 25 Kan. 100;

But, in statutes prescribing the jurisdictional prerequisites to the maintenance of actions for divorce or separation, the term "residence" has been held equivalent to "domicile."[6]

No person can be without a domicile in contemplation of law, and he can have but one domicile at the same time for one and the same purpose.[7]

## §217. Domicile by Operation of Law.

Domicile by operation of law is consequential, as that of a wife arising from marriage.[8] The law fixes the domicile of a wife by that of the husband, and during cohabitation she cannot acquire a domicile elsewhere.[9] The rule just stated, however, does not apply where the wife has been abandoned.

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Briggs v. Rochester, 16 Gray (Mass.) 337; Morgan v. Nunes, 54 Miss. 308; Alston v. Newcomer, 42 Miss. 186; Johnson v. Smith, 43 Mo. 499; Walker v. Walker, 1 Mo. App. 404; Stout v. Leonard, 37 N. J. L. 492; Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Heennon vs. Grizzard, 89 N. C. 115; Foster v. Hall, 4 Humphrey (Tenn.) 346; Brown v. Boulden, 18 Tex. 431; Long v. Ryan, 30 Gratt. (Va.) 718; Dean v. Cannon, 37 W. Va. 123, 16 S. E. 444; Hall v. Hall, 25 Wis. 600; Collins v. Ashland, 112 Fed. 175; Chambers v. Prince, 75 Fed. 176; Brisenden v. Chamberlain, 53 Fed. 307.

[6] Hinds v. Hinds, 1 Iowa 36; Shaw v. Shaw, 98 Mass. 158; Hervey v. Hervey, 56 N. J. Eq. 166, 3 Atl. 767; Firth v. Firth, 50 N. J. Eq. 137, 24 Atl. 916; Coddington v. Coddington, 20 N. J. Eq. 263; Winship v. Winship, 16 N. J. Eq. 107; Demeli v. Demeli, 120 N. Y. 485, 24 N. E. R. 996, 17 Am. St. R. 652; Hall v. Hall, 25 Wis. 600.

[7] Algood v. Williams, 92 Ala. 551, 8 So. 722; New Haven 1st. Ntl. Bank v. Balsom, 35 Conn. 351; Love v. Cherry, 24 Iowa, 204; Graham v. Trimmer, 6 Kan. 230; Gilman v. Gilman, 52 Me. 165; Pickering v. Cambridge, 144 Mass. 244, 10 N. E. 827; Beecher v. Detroit, 114 Mich. 228, 72 N. W. 206; Warren v. Board of Registration, 72 Mich. 390, 40 N. W. 553, 2 L. R. A. 205; In re High, 2 Doug. (Mich.) 515.

[8] Story, Confl. of Laws, Sec. 48; Smith v. Croon, 7 Fla. 81.

[9] Talmadge v. Talmadge, 66 Ala. 194; Johnson v. Turner, 29 Ark. 280; Kashon v. Kashon, 3 Col. 312; Wingfield v. Rhea, 77 Ga. 84; Cooper v. Beers, 143 Ill. 25, 33 N. E. 61; Jenness v. Jenness, 24 Ind. 355; Maguire v. Maguire, 7 Dana (Ky.) 181; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Burlin v. Shannon, 115 Mass. 438; Spaulding v. Steel, 129 Mich. 237, 88 N. W. 627; Hairston v. Hairston, 27 Miss. 704, 61 Am. Dec. 530; Smith v. Smith, 19 Neb. 706, 28 N. W. 495; O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. 110; Hunt v. Hunt, 72 N. Y. 217, 28 Am. R. 129; Hicks v. Skinner, 71 N. C. 539, 17 Am. R. 16; Dougherty v. Snyder, 15 Serg. & R. (Pa.) 84, 16 Am. Dec. 520; White v. White, 18 R. I. 292, 27 Atl. 506; Hascall v. Hafford, 107 Tenn. 355, 65 S. W. 423, 89 Am. St. R. 952; Clements v. Lacey, 51 Tex. 150; Atherton v. Atherton, 181 U. S. 155, 45 L. Ed. 794.

or forced by brutal treatment to leave the husband. In such cases the wife is permitted to establish a domicile for herself.[10] But a wife who has left her husband without just cause can acquire no separate domicile.[11]

### §218. Domicile for Purpose of Divorce.

Where the husband has been guilty of conduct which entitles the wife to a divorce, it is held in some states that she may acquire a separate domicile of her own for the purpose of conferring jurisdiction on the proper tribunal in a proceeding for divorce or separation.[12]

After the husband's death, the wife has of course, a right to elect her own domicile.[13]

### §219. Change of Domicile.

An existing domicile is not changed until a person abandons it with no present intention of returning thereto, and a new domicile is not acquired until the new residence is taken with the present intention of remaining there indefinitely. This explains why those who, by acts and declarations, prove that they are in a place to remain a fixed time, or until the outcome of a certain event, such as the obtaining of a divorce, are held by all courts to have no domicile in such place. The courts thereof have no jurisdiction to divorce them, and a decree of divorce, if obtained under such circumstances, is absolutely void.

Three things are necessary in the acquirement of a new domicile; viz: (1) the act of removing from the existing domicile with no present intention of returning thereto; (2) actual residence in the new locality, coupled with the present intention of residing there indefinitely; and, (3) the legal ability to acquire a new domicile.

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[10] Shaw v. Shaw, 98 Mass. 158; Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200.

[11] Maguire v. Maguire, 7 Dana (Ky.) 181; Burlen v. Shannon, 115 Mass. 438.

[12] Hanberry v. Hanberry, 29 Ala. 719; Moffatt v. Moffatt, 5 Cal. 280; Chapman v. Chapman, 129 Ill. 386, 21 N. E. 806; Jenness v. Jenness, 24 Ind. 355, 87 Am. Dec. 335; Kline v. Kline, 57 Iowa, 386, 10 N. W. 825; Johnson v. Johnson, 12 Bush. (Ky.) 485; Harding v. Harding, 9 Me. 140, 23 Am. Dec. 549; Watkins v. Watkins, 135 Mass. 83; Hopkins v. Hopkins, 35 N. H. 474; Hunt v. Hunt, 72 N. Y. 217, 28 Am. R. 129; Irby v. Wilson, 21 N. C. 568; Colvin v. Reed, 55 Pa. St. 375; White v. White, 18 R. I. 292, 27 Atl. 506; Cravens v. Cravens, 27 Wis. 418; Cheever v. Wilson, 9 Wall. (U. S.) 108, L. Ed. 604.

[13] Cheely v. Clayton, 110 U. S. 701, 28 L. Ed. 328, 4 S. C. 328.

Both residence and intention must be proved. Proof of intention to remain indefinitely would establish only residence, which does not confer jurisdiction to divorce. A person can have but one domicile at the same time, although they may have many different residences. Minors, idiots and lunatics cannot acquire a new domicile. The domicile of the minor is where the parent or guardian is domiciled; that of a lunatic remains where it was when he was adjudged non compos mentis. An idiot's domicile is where his legal guardian is domiciled.

It is settled law throughout the United States that a wife may acquire a new domicile, separate from that of her husband, whenever she is justified in leaving him. The measure of justification is, acts committed by the husband that entitles the wife to a dissolution of the marriage relation.

The legal doctrine that both residence and intention must be proved to effect a change of domicile, is world wide. It is the ruling of all courts, and has been carried to the extent of holding that the place where one has lived continuously for many years does not become his domicile unless it can be shown, by competent proof, that such person formed the intention of abandoning the existing domicile and the intention of remaining in the last place of residence indefinitely.[14]

## §220. Proof of Domicile.

The complainant or party to the marriage instituting the action for divorce, in order to obtain a decree dissolving the marriage which shall be entitled to faith and credit everywhere, under the "faith and credit" clause of the federal constitution and the rules of interstate and international law, must not only have an actual domicile in the state where the suit is instituted, for the length of time required by its laws, but must furnish proof of such domicile in conformity with the laws of the state and the requirements of interstate and international law. No presumptions are to be indulged in respecting domicile, and when relied on as the jurisdictional basis of a suit for divorce, the burden of establishing domicile rests upon the one alleging it.

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[14] Rumping v. Rumping, 36 Mont. 37, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197; Pearce v. Pearce, 132 Ala. 221, 31 So. 85, 90 Am. St. R. 901; Becklenberg v. Becklenberg, 232 Ill. 120, 83 N. E. 423; Lamont v. Lamont, 134 Ga. 523, 68 S. E. 96; Bradfield v. Bradfield, 154 Mich. 115, 117 N. W. 588, 129 Am. St. R. 468; Blandin v. Brooks, (Vt.) 76 Atl. 184; Becker v. Becker, 160 Ind. 407, 66 N. E. 1010; State vs. Westmoreland, 76 S. C. 145, 56 S. E. 703, 8 L. R. A. (N. S.) 842; Ingram v. Ingram, 143 Ala. 129, 42 So. 24, 111 Am. St. R. 31; Hinkle v. Lovelace, 204 Mo. 208, 102 S. W. 1015; Joyner v. Joyner, 131 Ga. 217, 62 S. E. 182, 127 Am. St. R. 220, 18 L. R. A. (N. S.) 647; State v. Morse, 31 Utah 213, 87 Pac. 705, 7 L. R. A. (N. S.) 1127; Post v. Post, 105 N. Y. Supp. 910; Percival v. Percival, 186 N. Y. 587, 79 N. E. 1114; Felt v. Felt, 59 N. J. Eq. 606, 49 Atl. 1071, 47 L. R. A. 546; Roe v. Roe, 52 Kan. 724, 35 Pac. 808; Haddock v. Haddock, 201 U. S. 562, 50 L. Ed. 867, 26 Sup. Ct. 525, 5 Am. Cas. 1; Bidwell v. Bidwell, 139 N. C. 402, 52 S. E. 55, 2 L. R. A. (N. S.) 324; McCreery v. Davis, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655; Duxstad v. Duxstad, 17 Wyo. 411, 100 Pac. 112, 129 Am. St. R. 1138; Winans v. Winans, 205 Mass. 388, 91 N. E. 394, 28 L. R. A. (N. S.) 992; Watkinson v. Watkinson, 68 N. J. Eq. 632, 60 Atl. 931, 6 Am. Cases 326, 69

The appearance of a non-resident defendant cannot invest a court with jurisdiction of a suit for divorce instituted by a person who has no bona fide domicile within the state.[15]

The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.[16]

The laws of the different states governing proof of domicile are so dissimilar that each individual case must depend upon the laws of the state in which the suit is tried, as to the manner and kind of evidence necessary to establish domicile. In general, it may be said that not only must residence in the state be proved, but it must be shown that the intention of remaining has existed at all times during the residence. The law of domicile is complex and difficult. It depends largely upon intention, and upon the acts and declara-

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L. R. A. 397; Sworiski v. Sworiski, 75 N. H. 1, 70 Atl. 119; Stone v. Stone, 134 Mo. App. 242, 113 S. W. 1157; Duke v. Duke, 27 N. J. Eq. 434, 65 Atl. 117; White v. Tenant, 31 W. Va. 790, 8 S. E. 596; Coburn v. Coburn, 70 Mich. 647, 38 N. W. 607; Dunham v. Dunham, 168 Ill. 584, 44 N. E. 841, 35 L. R. A. 70. A wife who, upon separation from her husband, goes to another state for the purpose of obtaining a divorce and, brings suit without disclosing the fact that a suit is pending in the state of her former residence involving the same matters alleged as a cause for divorce and in which she has appeared, is guilty of such fraud as to invalidate a decree of divorce obtained by her, although the pending of the prior suit could not have been pleaded in abatement or in bar to her divorce suit. Dunham v. Dunham, 168 Ill. 584, 35 L. R. A. 70.

[15] Andrews v. Andrews, 188 U. S. 14, 47 L. Ed. 366, 176 Mass. 92, 57 N. E. 333.

[16] Thompson v. Whitman, 85 U. S. 457, 21 L. Ed. 897.

tions in each individual case. Acts and declarations, to be of value as proof of intention, must be consistent with the intention sought to be proved, and inconsistent with any other intention. If the applicant for a decree of divorce goes into another state for the purpose of procuring a divorce, and for no other purpose, he cannot acquire such a domicile therein as will give the courts of the latter state jurisdiction to grant the decree. In such a case any decree granted would be absolutely void, even although the trial court should expressly find that the applicant was in good faith domiciled in the state where the decree was granted. The record of the decree can be contradicted, even in a collateral proceeding in another state, if it can be shown that such a domicile as would give the courts of the state granting the decree jurisdiction does not exist.[17]

## §221. Temporary Absence as Affecting Domicile.

As a new domicile is acquired by giving up the existing one, with no present intention of returning thereto, and taking the new residence with the present intention of residing there indefinitely, it being necessary, in order to effect and prove a change of domicile, to prove both residence and intention, it follows as a necessary conclusion that a domicile once established by the co-operation of the fact of residence and intention of remaining indefinitely is not lost or impaired by temporary absences, for health, pleasure, or business. Otherwise those whose business or health cause them to travel in different states and countries could never acquire a new domicile. The laws of all countries allow every person to have one domicile, and no more than one at the same time. That domicile is wherever the cooperation of the fact of residence and intention of remaining indefinitely fixes it, and all courts hold that such domicile is not forfeited nor in any manner impaired by reason of temporary absence therefrom, so long as the intention exists of returning thereto, which is shown by keeping the domicile during the temporary absences, and by a return thereto when the cause for temporary absence no longer exists.[18]

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[17] Andrews v. Andrews, 188 U. S. 14, 47 L. Ed. 366; Thompson vs. Whitman, 85 U. S. 457, 21 L. E. Ed. 897.

[18] Duekstad v. Duekstad, 17 Wy. 411, 100 Pac. 112; Winans v. Winans, 205 Mass. 388, 91 N. E. 394, 28 L. R. A. (N. S.) 992; Hoffman v. Hoffman, 155 Mich. 328, 118 N. W. 990; Lamont v. Lamont (Ga.), 68 S. E. 96; Duke v. Duke, 72 N. J. Eq. 434, 65 Atl. 1117; Bradfield v. Bradfield, 154 Mich. 115, 117 N. W. 588.

# CHAPTER XXII.

# CAUSES AUTHORIZING DIVORCE AND THE PROCEDURE IN DIFFERENT STATES.

§222. Courts without Power to Grant Divorce except by Statutory Authority.
§223. Alabama.
§224. Alaska.
§225. Arizona.
§226. Arkansas.
§227. California.
§228. Colorado.
§229. Connecticut.
§230. Delaware.
§231. District of Columbia.
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§234. Guam.
§235. Hawaii Territory.
§236. Idaho.
§237. Illinois.
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§247. Minnesota.
§248. Mississippi.
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§250. Montana.
§251. Nebraska.
§252. Nevada.
§253. New Hampshire.
§254. New Jersey.
§255. New Mexico.
§256. New York.
§257. North Carolina.
§258. North Dakota.
§259. Ohio.
§260. Oklahoma.
§261. Oregon.
§262. Pennsylvania.
§263. Porto Rico.
§264. Rhode Island.
§265. South Carolina.
§266. South Dakota.
§267. Tennessee.
§268. Texas.
§269. Utah.
§270. Vermont.
§271. Virginia.
§272. Washington.
§273. West Virginia.
§274. Wisconsin.
§275. Wyoming.

## §222. Courts without Power to Grant Divorce except by Statutory Authority.

The courts of any state or territory of the United States are without power to grant absolute divorces except as authorized by statute, or the written law of the state in which the suit is instituted. The constitutions of nearly all, if not all, of the states of the Union prohibit legislative divorces for any cause, the sole power being vested in the courts of the respective states.

The following are the causes or grounds for absolute divorce in the various states, and a statement of the time of residence required, and the procedure in each state.

## §223. Alabama.

*Causes:* (1) Incurable impotency at date of marriage; (2) adultery; (3) abandonment for two years (4) imprisonment in the penitentiary for two years under sentence of not less than seven years; (5) crime against nature whether with mankind or beast; (6) habitual drunkenness; (7) pregnancy of the wife at the time of the marriage without the knowledge or agency of the husband; (8) actual violence by the husband on the person of the wife attended with danger to life or health.

*Procedure:* The plaintiff must be domiciled in the state for the period of one year before commencing the action. The cause may be tried about five months after service on the defendant, before the chancery court. The decree does not permit either party to marry again until sixty days after it is rendered. If the ground of divorce is desertion, the plaintiff must be domiciled in the state for the period of three years before instituting the suit.[1]

## §224. Alaska.

*Causes:* (1) Impotency at the time of the marriage, and continuing at the time of the commencement of the suit; (2) adultery; (3) conviction of felony; (4) wilful desertion for two years; (5) habitual drunkenness since marriage, continuing for one year; (6) cruel and inhuman treatment calculated to impair or endanger life.

*Procedure:* The plaintiff must be domiciled in the territory two years before commencing suit. The cause may be tried three months after service on the defendant before the United States District Court. The decree does not permit either party to marry until the expiration of one year after it is rendered.[2]

## §225. Arizona.

*Causes:* (1) Adultery; (2) impotency at the time of the marriage and continuing to the time of the commencement of the suit; (3) conviction of felony under sentence one year old unless the conviction was on the testimony of the other party to the marriage; (4) wilful desertion or habitual intemperance for the period of one year; (5) cruel treatment, excesses or outrages by one of the parties toward the other; (6) husband's neglect for one year to provide the necessaries of life, he having the ability; (7) conviction, prior to the marriage, of an infamous crime, without the knowledge of the other party; (8) pregnancy of the wife at the time of the marriage, without the knowledge or agency of the husband.

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[1] Revised Code of Alabama, 1907; Davis v. Davis, 132 Ala. 219, 31 So. 473; Wilkinson v. Wilkinson, 133 Ala. 382, 32 So. 124; Martin v. Martin, 55 So. 632.

[2] Elliott v. Elliott, 3 Alaska 352; U. S. Stat. at Large, Vols. 31-33; Carter's Alaska Code, 1900; Leak v. Leak, 156 Fed. 474, 84 C. C. A. 284; 3 Alaska 163; Terrill v. Terrill, 2 Alaska 475.

*Procedure:* The plaintiff must be domiciled in the state for the period of one year before commencing the action. The cause may be tried by the court after the expiration of three months from the time of service. The suit must be instituted in the county where the plaintiff has had a domicile for the period of six months next preceding the time of filing the suit.[3]

### §226. Arkansas.

*Causes:* (1) Impotency at the time of the marriage and at the time of the action; (2) wilful desertion for one year; (3) former husband or wife living, and undivorced at the time of the marriage; (4) conviction of felony or other infamous crime; (5) habitual drunkenness for the period of one year; (6) cruel and barbarous treatment by one party endangering the life of the other, or indignities rendering the life of the other intolerable; (7) adultery, subsequent to the marriage.

*Procedure:* The plaintiff must be domiciled in the state for the period of one year before commencing the action. The action may be tried after the expiration of four months from the time of service on the defendant. The plaintiff must have been a resident of the state when the cause of action accrued, or it must be cause for divorce in the state where the plaintiff had a domicile when the cause accrued. Action tried by the court.[4]

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[3] Revised Statutes of Arizona, 1900; DeHerlan v. DeHerlan, 6 Ariz. 270, 56 Pac. 871; Walker's Est., 5 Ariz. 70, 46 Pac. 67.

[4] Revised Statutes of Arkansas, 1904; Womack v. Womack, 72 Ark. 281, 183 S. W. 1136; Pryor v. Pryor, 88 Ark. 302, 114 S. W. 700, 129 Am. St. R. 102; Wood v Wood, 59 Ark. 441, 27 S. W. 641, 43 Am. St. R. 42, 28 L. R. A. 157.

### §227. California.

*Causes:* (1) Adultery; (2) extreme cruelty; (3) wilful desertion for one year; (4) wilful neglect by husband for one year; (5) habitual intemperance for one year; (6) conviction of felony.

*Procedure:* The plaintiff must be domiciled in the state one year, and in the county where the suit is instituted three months, before commencing the action. The trial may be had after the expiration of three months from the time of service on the defendant. The first decree is interlocutory, from which an appeal may be taken within six months after it is rendered. Absolute divorce is granted if no cause to the contrary is shown, one year after filing the interlocutory decree. The trial is by the court.[5]

### §228. Colorado.

*Causes:* (1) Impotency; (2) another husband or wife living, undivorced; (3) adultery subsequent to the marriage; (4) wilful desertion for one year; (5) extreme and repeated cruelty; (6) failure of husband to support wife and family for one year, he being in good health; (7) habitual drunkenness for one year; (8) conviction of felony.

*Procedure:* The plaintiff must be domiciled for the period of one year before commencing the action. Trial is had by jury after the expiration of three months after service on the defendant. The decree does not become absolute until the expiration of one year from the date of the verdict of the jury, during which time neither party can marry again.[6]

### §229. Connecticut.

*Causes:* (1) Adultery; (2) another husband or wife living and undivorced; (3) wilful desertion for the period of three years; (4) seven years' absence unheard from; (5) habitual intemperance; (6) intolerable cruelty; (7) sentence to imprisonment in the State Prison.

*Procedure:* The plaintiff must be domiciled in state for a period of three years before commencing the action. Trial may be had before the court after the expiration of four months from the time of service on the defendant.[7]

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[5] Revised Code of California, 1909; Deyoe v. Superior Court, 140 Cal. 476, 74 Pac. 28, 98 Am. St. R. 73; Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 134 Am. St. R. 107, 23 L. R. A. (N. S.) 880.

[6] Revised Statutes of Colorado, 1905; Cairnes v. Cairnes, 29 Colo. 264, 68 Pac. 233, 93 Am. St. R. 55; Rudolph v. Rudolph, 114 Pac. 977; Mottschall v. Mottschall, 31 Colo. 260, 72 Pac. 1035; Branch v. Branch, 30 Colo. 499, 71 Pac. 1035.

## §230. Delaware.

*Causes:* (1) adultery; (2) bigamy, at the suit of the innocent and injured party to the first marriage; (3) conviction of crime followed by continuous imprisonment for the period of two years; (4) extreme cruelty, endangering life or rendering cohabitation unsafe; (5) wilful desertion for the period of two years; (6) habitual drunkenness for two years.

*Procedure:* The plaintiff may bring suit for divorce in the county where either party has been domiciled in the state for the period of one year, and where so domiciled when the cause of divorce arose, or, if the cause of divorce arose when neither party was domiciled in the state, after the plaintiff has been domiciled in the state for the period of two years, provided it was a cause for divorce in the place where the plaintiff was domiciled when it arose. The cause is tried before the court after the expiration of two months from the time of service on the defendant. The first decree is *nisi,* and an absolute decree may be granted after the expiration of one year from the date of the *nisi* decree, unless an appeal is pending.[8]

## §231. District of Columbia.

*Causes:* Adultery, only.

*Procedure:* The plaintiff must be domiciled in the district for three years before commencing suit, unless the adultery occurred in the district. The equity court of the district hears the cause, which may be tried two months after service on the defendant. Co-respondents must be made parties and served, as well as the guilty spouse. The U. S. Attorney must appear, and defend and protect the public rights.[9]

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[7] General Statutes of Connecticut, 1902; Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 34 L. R. A. 449; Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531.

[8] Laws of Delaware 1907-1909; Noudain v. Noudain, 3 Penn. 518, 52 Atl. 262; Donovan v. Donovan, 77 Atl. 765; Krussman v. Krussman, 78 Atl. 642.

[9] District of Columbia Code, 1905; Roate v. Roate, 35 App. D. C. 398; Thompson v. Thompson, 35 App. D. C. 14; Williamson v. Williamson, 34 App. D. C. 536.

## §232. Florida.

*Causes:* (1) Consanguinity; (2) impotency; (3) adultery of one of the parties; (4) extreme cruelty; (5) habitual, violent and ungovernable temper; (6) habitual intemperance; (7) wilful, obstinate and continued desertion for the period of one year; (8) the obtaining of a divorce by the defendant in another state; (9) a husband or wife of one of the parties living at the time of marriage and undivorced.

*Procedure:* The plaintiff must have had a domicile in the state for the period of two years before commencing the action. The trial may be had before the court of chancery after the expiration of three months from the time of service on the defendant. The proceedings and trial are the same as in other chancery suits.[10]

## §233. Georgia.

*Causes:* (1) Consanguinity or affinity; (2) mental incapacity at time of marriage; (3) impotency at time of marriage; (4) force, menace, fraud or duress in procuring the marriage; (5) pregnancy of the wife at the time of the marriage, unknown to the husband; (6) adultery committed after the marriage; (7) wilful and continued desertion for the period of three years; (8) conviction of an offense involving moral turpitude, and sentence to the penitentiary for two years or more; (9) cruel treatment or habitual intemperance.

*Procedure:* The plaintiff must have had a domicile within the state for a period of one year before commencing the action. The case may be tried by a jury, and the jury may grant either an absolute or a limited divorce. Trial may be had from two to four months after service on the defendant. Before a decree of divorce can be made by the court, two separate term juries must have returned a verdict in favor of absolute divorce. The terms of court are six months apart in each county.[11]

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[10] General Statutes of Florida, 1906; Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670; Spencer v. Spencer, 55 So. 71; Beekman v. Beekman, 53 Fla. 858, 43 So. 923.
858, 43 So. 923.

[11] Code of Georgia, 1911; Lamont v. Lamont, 68 S. E. 96; McConnell v. McConnell, 70 S. E. 647; Cale v. Davis, 68 S. E. 1101; Watts v. Watts, 130 Ga. 683, 61 S. E. 593; Griffin v. Griffin, 130 Ga. 527, 61 S. E. 16; Peelrick v. Peelrick, 134 Ga. 662, 68 S. E. 515.

### §234. Guam.

This territorial possession of the United States has no divorce laws.[12]

### §235. Hawaii Territory.

*Causes:* (1) Adultery; (2) wilful and utter desertion for the period of three years; (3) imprisonment for life, or for seven years or more where no pardon is granted; (4) Chinese leprosy contracted since marriage, if incurable; (5) extreme cruelty; (6) habitual intemperance; (7) wilful neglect.

*Procedure:* The plaintiff may commence suit after a domicile of two years in the territory, but no divorce may be granted unless the parties have lived as husband and wife within the territory. The cause may be tried in the circuit where it is instituted, after the expiration of four months from the time of service on the defendant. A divorce suit for the cause of adultery must be brought within one year after discovery of the offense.[13]

### §236. Idaho.

*Causes:* (1) Adultery; (2) extreme cruelty; (3) wilful desertion for the period of one year; (4) wilful neglect by husband for the period of one year; (5) habitual intemperance for the period of one year; (6) conviction of felony; (7) permanent insanity, where defendant has been confined in a state insane asylum for a period of six years next preceding the commencement of the action, and it shall appear by the testimony that such insanity is permanent, and the plaintiff has resided in the state one whole year preceding the commencement of the action.

*Procedure:* The plaintiff may commence the action after a domicile of one year in the state. The action is tried before the court after the expiration of two months from the time of service on the defendant. The decree does not permit either party to marry again for the period of six months after it is rendered and filed. A marriage of either party before that time constitutes bigamy. The prosecuting attorney must defend all default actions for the state.[14]

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[12] Delasama v. Delasama, 201 U. S. 303, 50 L. Ed. 765.

[13] Revised Laws of Hawaii, 1905; Hebron v. Hebron, 11 Hawaii 713; Proper v. Proper, 14 Hawaii 596; Opiopio v. Karre, 7 Hawaii 342.

[14] Revised Code of Idaho, 1908; Laws of 1915; Harpold v. Doyle, 102 Pac. 158; Hilton v. Stewart, 15 Idaho 150, 96 Pac. 579, 128 Am. St. R. 48.

## §237. Illinois.

*Causes:* (1) Impotency at time of marriage; (2) husband or wife living undivorced; (3) adultery subsequent to the marriage; (4) wilful desertion for two years without cause; (5) habitual drunkenness for two years; (6) attempting the life of the other spouse by poison or other means showing malice; (7) extreme and repeated physical cruelty endangering life or health; (8) conviction of felony or other infamous crime.

*Procedure:* The plaintiff may commence the action after a domicile of two years in the state. Trial may be had after the expiration of three months after service on the defendant. The decree does not permit either party to marry until the expiration of one year from the time it is rendered and filed. The prosecuting attorney must defend all default actions on behalf of the state.[15]

## §238. Indiana.

*Causes:* (1) Adultery; (2) impotency, existing at the time of the marriage; (3) abandonment for two years; (4) cruel and inhuman treatment; (5) habitual drunkenness; (6) failure of husband to provide for family for the period of two years; (7) conviction, subsequent to the marriage, of an infamous crime.

*Procedure:* The plaintiff may commence the action after a domicile of two years in the state. Trial may be had after the expiration of three months from the time of service on the defendant. Unless there is personal service on the defendant neither party can marry again for two years from the date of the decree. The prosecuting attorney must resist all undefended actions.[16]

## §239. Iowa.

*Causes:* (1) Adultery, subsequent to the marriage; (2) desertion for the period of two years; (3) conviction of felony after marriage; (4) inhuman treatment endangering the life of the other spouse; (5) habitual drunkenness after marriage; (6) wife pregnant at time of marriage without the husband's knowledge or agency, unless the husband has an illegitimate child, or children, then living.

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[15] Revised Statutes of Illinois, 1913; Land v. Land, 206 Ill. 288, 68 N. E. 1109, 99 Am. St. R. 171; Becklenberg v. Becklenberg, 232 Ill. 120, 83 N. E. 423; Dorsey v. Brigham, 177 Ill. 250, 52 N. E. 303, 69 Am. St. R. 228, 42 L. R. A. 809; Olson v. People, 219 Ill. 40, 76 N. E. 89; People v. Spoor, 235 Ill. 230, 85 N. E. 207.

[16] Burns' Annotated Statutes of Indiana; State v. Friedley, 151 Ind. 404, 51 N. E. 473; West v. West, 38 Ind. App. 659, 7 N. E. 987; Mason v. Mason, 101 Ind. 25; Stone v. Stone, 158 Ind. 628, 64 N. E. 86; Day v. Hottingham, 160 Ind. 408, 66 N. E. 998.

*Procedure:* The plaintiff must have been domiciled in the state for the period of one year before commencing the action. The trial may be had before the court, and in open court, after the expiration of three months from the time of service on the defendant. The decree does not become absolute or permit either party to marry again until the expiration of one year from the date it is rendered.[17]

## §240. Kansas.

*Causes:* (1) A former husband or wife living, undivorced; (2) abandonment for the period of one year; (3) adultery; (4) impotency; (5) pregnancy of the wife at the time of the marriage by another than the husband; (6) extreme cruelty; (7) fraudulent contract of marriage; (8) habitual drunkenness; (9) gross neglect of duty; (10) conviction and imprisonment in the penitentiary for felony subsequent to the marriage.

*Procedure:* The action may be commenced after the plaintiff has been domiciled in the state for the period of one year. The trial may be had before the court after the expiration of two months from the time of service on the defendant. The first decree is *nisi*, and neither party can marry until it becomes absolute, at the end of six months from the date of the *nisi* decree.[18]

## §241. Kentucky.

*Causes:* (1) Abandonment for the period of one year; (2) living in adultery; (3) condemnation for felony; (4) concealing loathsome disease at the time of the marriage, or contracting one afterwards; (5) force, fraud or duress in procuring marriage; (6) uniting with a religious society which forbids husband and wife from cohabiting, or the rules of which require a renunciation of the marriage covenant; (7) such impotency or malformation as prevents sexual intercourse; (8) living apart without cohabitation for five consecutive years; (9) habitual drunkenness for the period of one year; (10) husband guilty of such conduct as to endanger the life or health of the wife; (11) pregnancy of the wife at the time of the marriage without the husband's knowledge or agency, or such lascivious behaviour on her part as proves her to be unchaste; (12) habitual drunkenness of wife for one year if the husband is not also guilty of like cause; (13) husband guilty of such conduct as indicates aversion, or destroys peace and happiness.

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[17] Revised Code of Iowa, 1907; Laws of 1913; Graves v. Graves, 132 Iowa 199, 109 N. W. 707, 10 L. R. A. (N. S.) 216; Lawrence v. Nelson, 113 Iowa 277, 85 N. W. 84, 57 L. R. A. 583; Wood v. Wood, 136 Iowa 128, 113 N. W. 492, 12 L. R. A. (N. S.) 891; Tollefson v. Tollefson, 137 Iowa 151, 114 N. W. 631.

[18] Dassler's General Statutes of Kansas, 1909; Masterman v. Masterman, 58 Kan. 748, 51 Pac. 277; Dunn v. Dunn, 59 Kan. 773, 52 Pac. 69; Roberts v. Fagan, 76 Kan. 536, 92 Pac. 559; Durland v. Durland, 67 Kan. 734, 74 Pac. 274, 63 L. R. A. 959.

*Procedure:* The action may be commenced after the plaintiff has been domiciled in the state for the period of one year. The trial may be had in from three to six months after service on the defendant, before the court of chancery. The court must appoint an attorney to defend all uncontested cases. The action must be brought within five years after the act committed, and the act for which divorce is sought must have been committed in Kentucky, or, if outside of that state, it must be cause for absolute divorce in the state where it was committed.[19]

## §242. Louisiana.

*Causes:* (1) Adultery; (2) condemnation to infamous punishment; (3) habitual intemperance, excesses, cruel treatment or outrages of one spouse towards the other, such as to render their living together unsupportable; (4) public defamation; (5) abandonment; (6) attempts of one against the life of the other; (7) one charged with infamous offenses, fleeing from justice. In all cases except adultery, or sentence to an infamous punishment, no divorce absolute shall be granted unless a separation from bed and board is first obtained, and two years shall have expired from the date of the decree of separation, and no reconciliation shall have taken place.

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[19] Revised Statutes of Kentucky, 1909; Williams v. Williams, 136 Ky. 71, 123 S. W. 337; Baker v. Baker, 136 Ky. 617, 124 S. W. 866; Coles v. Coles, 130 Ky. 349, 113 S. W. 417; Barclay v. Commonwealth, 116 Ky. 275, 76 S. W. 4; Sebastian v. Rose, 135 Ky. 197, 122 S. W. 120; Parker v. Parker, 31 Ky. 197, 122 S. W. 120; Parker v. Parker, 31 Ky. L. Sep. 1228, 104 S. W. 1028; Pope v. Pope, 170 S. W. 504; Davis v. Davis, 102 Ky. 440, 43 S. W. 168, 39 L. R. A. 403; Andrews v. Andrews, 120 Ky. 718, 87 S. W. 1080.

*Procedure:* The courts of Louisiana have no jurisdiction to grant divorce unless the parties, during the marriage relation, have lived as husband and wife in the state. Unless the ground is adultery or an infamous offense, the first action, which may be commenced after a domicile of one year, must be for a divorce from bed and board. If the defendant fails to return to the matrimonial home for a period of one year after being summoned to do so, after the expiration of two years from the date of the decree for divorce from bed and board, an action for absolute divorce may be instituted by the plaintiff. Trial is had before the court after the expiration of three months from the time of service on the defendant. The wife cannot marry again for ten months after absolute divorce. The guilty party cannot marry his or her paramour.[20]

### §243. Maine.

*Causes:* (1) Adultery; (2) impotency; (3) extreme cruelty; (4) utter desertion continued for the period of three years; (5) confirmed habits of intoxication; (6) cruel and abusive physical treatment; (7) husband, being able, grossly and wantonly neglects to provide maintenance for the wife; (8) insanity when in consequence thereof the defendant has been committed to and confined in a state asylum for the insane for fifteen consecutive years next preceding the commencement of the action, and if found to be incurable.

*Procedure:* The action may be commenced after the plaintiff has been domiciled in the state for the period of one year. The trial may be had in from four to six months after service on the defendant, depending on terms of court. Either party may demand a jury trial. The plaintiff must have resided in the state when the cause occurred.[21]

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[20] Revised Laws of Louisiana, 1910; Revised Civil Code of Louisiana, 1909; State v. Boettner, 53 So. 555; Nissen v. Farquar, 121 La. 119, 44 So. 799; Elmore v. Johnson, 121 La. 277, 46 So. 310; Rohr v. Stechman, 119 La. 159, 43 So. 991; Succession of Gabisso, 119 L. A. 1035, 44 So. 856, 11 L. R. A. (N. S.) 1082; Wilcox v. Nixon, 115 La. 47, 38 So. 890, 112 Am. St. R. 266; Ellerbusch v. Koegel, 108 La. 51, 32 So. 191; Hill v. Hill, 114 La. 117, 38 So. 77; Cornelia v. Cornelia, 114 L. A. 950, 38 So. 690; Ramond v. Carrano, 112 La. 869, 36 So. 787; Blake v. Dudley, 111 La. 1096, 36 So. 203; Nichols v. Maddox, 52 La. An. 1493, 27 So. 966.

### §244. Maryland.

*Causes:* (1) Impotency; (2) any cause which by the laws of the state render the marriage null and void *ab initio;* (3) adultery; (4) deliberate and final abandonment for the period of three years; (5) illicit carnal intercourse of the wife with a man, other than the husband, before marriage without the husband's knowledge.

*Procedure:* The action may be commenced at any time if the cause of action was committed in the state. Otherwise either the plaintiff or the defendant must have had a domicile in the state for the period of two years before commencement of the action. The cause may be tried and determined after the expiration of five months from the commencement of the action. Trial is had on the equity side of the court.[22]

### §245. Massachusetts.

*Causes:* (1) Adultery; (2) impotency; (3) utter desertion continued for three consecutive years next preceding commencement of the action; (4) gross and confirmed habit of intoxication; (5) cruel and abusive treatment; (6) neglect of husband to provide suitable maintenance for the wife when of sufficient ability so to do; (7) sentence to confinement at hard labor for life or five years or more, in the state prison, jail or house of correction.

*Procedure:* If the parties have ever lived as husband and wife in Massachusetts, the action may be commenced after either party has had a domicile of three years in the state, otherwise the plaintiff must have been domiciled in the state for the period of five years before commencing the action.

The trial may be had two months after service on the defendant. The first decree is *nisi*, and does not dissolve the marriage, or allow either party to marry again. An absolute divorce may be entered six months after the *nisi* decree, if no cause is shown to the contrary. The guilty party cannot marry for two years after the absolute divorce is entered.[23]

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[21] Revised Statutes of Maine, 1903; Walker v. Walker, 89 Atl. 373; Leathers v. Leathers, 79 Atl. 16; Spinney v. Spinney, 87 Me. 484, 32 Atl. 1019.

[22] Public General Laws of Maryland, 1904; Wheeler v. Wheeler, 101 Md. 435, 61 Atl. 216; McSherry v. McSherry, 77 Atl. 653; Adams v. Adams, 101 Md. 506, 61 Atl. 628.

## §246. Michigan.

*Causes:* (1) Adultery; (2) impotency at the time of the marriage; (3) imprisonment for three years in any prison, jail or house of correction; (4) habitual drunkenness; (5) defendant having obtained a divorce in another state; (6) desertion for two years; (7) neglect and refusal of the husband to support the wife when of sufficient ability so to do; (8) extreme cruelty.

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*Procedure:* Unless the defendant is domiciled in the state and served therein with process when the suit is filed, or the parties have lived together as husband and wife in Michigan, suit cannot be commenced until the plaintiff has been domiciled in the state two years. Except for the cause of desertion, the trial cannot be had until the expiration of two months from the time of commencement of the suit. The hearing is had in the court of chancery, in open court, unless the court orders a reference to a circuit court commissioner or other person authorized to administer oaths, to take the testimony. In all cases where there are minor children service of process must be made on the prosecuting attorney of the county where the suit is pending. The court may order the prosecuting attorney to appear in any uncontested case.[24]

## §247. Minnesota.

*Causes:* (1) Adultery; (2) impotency; (3) cruel and inhuman treatment; (4) sentence to imprisonment in any state prison or state reformatory subsequent to the marriage; (5) wilful desertion for one year.

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[23] Revised Laws of Massachusetts, 1902 and Supp. 1908; Commonwealth v. Stevens, 196 Mass. 280, 82 N. E. 33, 124 Am. St. R. 555; Whippen v. Whippen, 171 Mass. 560, 51 N. E. 174; Chace v. Chace, 191 Mass. 166, 77 N. E. 782; Tyler v. Tyler, 170 Mass. 150, 48 N. E. 1075; Brown v. Brown, 93 N. E. 607; Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145; Winans v. Winans, 205 Mass. 388, 91 N. E. 394, 28 L. R. A. (N. S.) 992. 11450

[24] C. L. 1915, (11433); How. 2nd. Ed., §11494; Filer v. Filer, 77 Mich. 469, 43 N. W. 887; Coon v. Coon, 129 N. W. 12; Bradfield v. Bradfield, 154 Mich. 115, 117 N. W. 588; Jamison v. Ramsey, 128 Mich. 315, 87 N. W. 260; Bentley v. Hosmer, 110 Mich. 626, 68 N. W. 650, 69 N. W. 660.

*Procedure:* The suit may be commenced after the plaintiff has been domiciled in the state one year. The trial may be had after the expiration of two months from the time of service on the defendant. The decree does not become absolute so as to permit either party to marry again until six months after it is filed in the clerk's office.[25]

## §248. Mississippi.

*Causes:* (1) Adultery; (2) natural impotency; (3) sentence to the penitentiary; (4) wilful, continued and obstinate desertion for two years; (5) habitual drunkenness; (6) habitual use of morphine, opium or other like drug; (7) habitual, cruel and inhuman treatment; (8) insanity or idiocy at the time of the marriage, unknown to the other party; (9) another husband or wife living, undivorced; (10) pregnancy of the wife at the time of the marriage, unknown to the husband and without his agency; (11) consanguinity.

*Procedure:* Unless both parties are domiciled in the state of Mississippi when the action is commenced and the defendant served with process within the state, the action cannot be commenced until one of the parties has had an actual domicile in the state for the period of one year. The trial may be had in the court of chancery three months after service on the defendant.[26]

## §249. Missouri.

*Causes:* (1) Impotency at the time of the marriage; (2) another husband or wife living, undivorced; (3) desertion for the period of one year; (4) adultery committed since the marriage; (5) conviction of felony or infamous crime since the marriage; (6) habitual drunkenness for the period of one year; (7) cruel and barbarous treatment endangering the life of the other; (8) indignities rendering the marriage relation intolerable; (9) husband becoming a vagrant; (10) conviction of felony or infamous crime prior to the marriage, unknown to the other party at the time of the marriage; (11) the wife being pregnant at the time of the marriage, by one other than the husband, and without the husband's knowledge at the time of the marriage.

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[25] Revised Laws of Minnesota, 1913; State v. Yoder, 130 N. W. 10; State v. Blue Earth County Court, 125 N. W. 133; Betchel v. Betchel, 101 Minn. 511, 112 N. W. 382, 12 L. R. A. (N. S.) 1100; Sodini v. Sodini, 94 Minn. 301, 102 N. W. 861, 110 Am. St. R. 371; Wilson v. Wilson, 95 Minn. 464, 104 N. W. 300.

[26] Code of Mississippi, 1906; Sutter v. Sutter, 72 Miss. 345, 16 So. 673; Graves v. Graves, 80 Miss. 677, 41 So. 384; Grego v. Grego, 78 Miss. 443, 28 So. 817.

*Procedure:* The action cannot be commenced until after the plaintiff has been domiciled in the state for the period of one year. The cause may be tried three months after service on the defendant. Actions for divorce are tried before the court.[27]

## §250. Montana.

*Causes:* (1) Adultery; (2) extreme cruelty; (3) wilful desertion for one year; (4) habitual intemperance for the period of one year; (5) conviction of felony.

*Procedure:* The action cannot be commenced until the plaintiff has been domiciled in the state for the period of one year. The cause may be tried before the court after the expiration of three months from the time of service on the defendant. Neither can marry again for the period of two years after the divorce is granted.[28]

## §251. Nebraska.

*Causes:* (1) Adultery; (2) impotency at time of marriage; (3) imprisonment in any prison, jail or house of correction for the period of three years or more; (4) desertion for the period of two years; (5) habitual drunkenness; (6) sentence to imprisonment for life.

*Procedure:* If the cause of action arose in the state, the action may be commenced after the plaintiff has been domiciled in the state for the period of one year. If the cause of action arose outside of the state, the action cannot be commenced until the plaintiff has been domiciled within the state for two years. Trial may be had before the court after the expiration of two months from service on the defendant. The decree does not become final or operative until the expiration of six months from the time it entered, and neither party can marry again until it becomes final.[29]

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[27] Revised Statutes of Missouri, 1900; State v. Hubbard, 201 Mo. 639, 100 S. W. 586; Robinson v. Robinson, 129 S. W. 725; Keller v. Keller, 129 S. W. 492; Humphrey v. Humphrey, 115 Mo. App. 361, 91 S. W. 405; Stone v. Stone, 134 Mo. App. 242, 113 S. W. 1157.

[28] Revised Code of Montana, 1907; State v. Dist. Court, 38 Mont. 166, 99 Pac. 291, 129 Am. St. R. 636; Franklin v. Franklin, 106 Pac. 353; Rumping v. Rumping, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197.

## §252. Nevada.

*Causes:* (1) Impotency at the time of the marriage; (2) adultery since the marriage; (3) wilful desertion for the period of one year; (4) conviction of a felony or other infamous crime; (5) habitual and gross drunkenness; (6) extreme cruelty by either party.

*Procedure:* The action may be commenced after the plaintiff has been domiciled in the state for the period of one year. The cause may be tried after the expiration of five months from the time of service on the defendant, and less time if the service is made within the state of Nebraska. The cause may be tried in open court at a regular term in the county of the plaintiff's domicile.[30]

## §253. New Hampshire.

*Causes:* (1) Impotency; (2) adultery; (3) extreme cruelty; (4) conviction of crime punishable by imprisonment for the period of one year, and actual imprisonment thereunder; (5) conduct seriously injuring the health of the other; (6) conduct seriously endangering reason; (7) absence for three years unheard of; (8) habitual drunkenness for the period of three years; (9) joining a religious society which believes and teaches that the relation of husband and wife is unlawful, and refusal to cohabit for the period of six months; (10) abandonment without cohabitation for three years; (11) wife absenting herself for three years; (12) husband absenting himself for three years, without provision for the support of the wife; (13) the wife of a citizen going to reside beyond the limits of the state, and remaining absent and separated for the period of ten years, without the consent of the husband, or without claiming her marriage rights; (14) wife of an alien, or citizen of another state, residing in this state three years, her husband having left the United States with the intention of becoming a citizen of a foreign country, and not having come into this state during said period and claimed his marital rights, or made suitable provision for his wife's support and maintenance.

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[29] Compiled Statutes of Nebraska, 1911; Lumber Co. v. Dewey, 126 N. W. 87; Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605; Kirkpatrick v. Kirkpatrick, 81 Neb. 627, 116 N. W. 499, 129 Am. St. R. 708; Schafer v. Schafer, 71 Neb. 708, 99 N. W. 482; Pine v. Pine, 72 Neb. 463, 100 N. W. 938.

[30] Compiled Laws of Nevada, 1912; Laws of 1913; Kapps. 7th District Court, 107 Pac. 95; McKinn v. 2nd. District Court, 110 Pac. 4; Worthington v. Dist. Court, 142 Pac. 238.

*Procedure:* The action may be commenced after the plaintiff has been domiciled in the state for the period of one year. The cause may be tried before the court after the expiration of four months from the time of service on the defendant.[31]

## §254. New Jersey.

*Causes:* (1) Adultery; (2) wilful continued and obstinate desertion for the term of two years.

*Procedure:* The action cannot be commenced until the plaintiff has had a domicile in the state for the term of two years, and no divorce can be granted unless the cause of action arose while either the plaintiff or the defendant was domiciled in the state, unless the act complained of was a cause for divorce under the laws of the state of the domicile of one of the parties at the time it was committed. The trial may be had before the court of Chancery, after the expiration of six months from the time of service on the defendant, and after the report of the commissioner is filed with the court. The first decree is *nisi* and does not become absolute until the expiration of six months, or, if an appeal is taken, until the appeal is decided, during which time neither party can again marry. A jury trial may be had. All decisions prior to 1907, when an entire new divorce act was passed by the legislature, are entirely inapplicable, except as to what acts constitute ground for divorce.[32]

## §255. New Mexico.

*Causes:* (1) Abandonment; (2) adultery; (3) impotency; (4) the wife pregnant at the time of the marriage, by another than the husband, without his knowledge; (5) cruel and inhuman treatment; (6) neglect of the husband to support the wife according to his ability, means and station in life; (7) habitual drunkenness; (8) conviction and imprisonment for felony.

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[31] Public Statutes of New Hampshire, 1901; Drake v. Drake, 78 Atl. 1071; Sworoski v. Sworoski, 75 N. H. 1, 70 Atl. 119; Shute v. Sargent, 67 N. H. 305, 36 Atl. 282; Hillard v. Baldwin, 80 Atl. 139.

[32] Compiled St. 1910, Vol. 2, pp. 2030-2032; Flynn v. Flynn, (N. J.) 92 Atl. 645; Koch v. Koch, 79 N. J. Eq. 24, 80 Atl. 113; Getz v. Getz, 81 N. J. Eq. 465, 81 Atl. 376; Mason v. Mason, 69 N. J. Eq. 292, 60 Atl. 337.

*Procedure:* The action cannot be commenced until the plaintiff has been domiciled in the state for the period of one year. The trial may be had after the expiration of three months from the time of service on the defendant. The first decree is *nisi*, and does not become absolute, or allow either party to marry again, until the expiration of six months from the date of the *nisi* decree.[33]

## §256. New York.

*Causes:* In the State of New York the only ground for absolute divorce is adultery.

*Procedure:* Unless the offense was committed in the state, while one or both of the parties were domiciled therein, the plaintiff must have had a domicile within the state for the period of one year before commencing the action. The trial may be had after the expiration of two months from the time of service on the defendant. In contested cases the trial is by jury, unless the parties stipulate that the hearing shall be had before a referee. Uncontested cases are tried by the court. The first decree is *nisi* and does not permit either party to marry, or dissolve the marriage. The *nisi* decree does not become absolute, automatically, but upon application of the party entitled to it. After the *nisi* decree has been recorded three months it may be made absolute. The *nisi* decree cannot be made absolute if the party entitled to it does not so desire, and it does not become and cannot be made absolute in case of the death of either party. The final judgment cannot stand if the parties cohabit after the interlocutory decree.[34]

## §257. North Carolina.

*Causes:* (1) Living in adultery; (2) separation for ten years, if there are no children, issue of the marriage.

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[33] Compiled Laws of New Mexico, 1897; Session Laws of 1897 to 1911; Territory v. Harwood, 110 Pac. 556.

[34] Consolidated Laws of New York, 1909; New Code of Civil Procedure (N. Y.), 1911; In Re Crandall's Est., 196 N. Y. 127, 89 N. E. 578, 134 Am. St. R. 830; Pettit v. Pettit, 93 N. Y. Supp. 1001, 105 App. Div. 312; Adams v. Adams, 106 N. Y. Supp. 1064; Cary v. Cary, 129 N. Y. Supp. 444; Dye v. Dye, 125 N. Y. Supp. 242; In Re Newcomb's Estate, 192 N. Y. 238, 84 N. E. 950.

*Procedure:* The plaintiff must have lived in the state for the period of two years before commencing the action, if adultery is the cause for which divorce is sought, and for ten years if living separate is the cause. The cause must be tried by a jury and a verdict in favor of absolute divorce rendered, before the court can enter such decree.[35]

## §258. North Dakota.

*Causes:* (1) Adultery; (2) extreme cruelty; (3) wilful neglect of wife for one year; (5) habitual intemperance for the period of one year; (6) conviction of a felony.

*Procedure:* The action may be commenced after the plaintiff has had a domicile within the state for the term of one year, if the plaintiff is a citizen of the United States. Otherwise the plaintiff must live in the state, or some other part of the United States, for the period of two years, and must have declared intention to become a citizen of the United States. The action may be tried after the expiration of thirty days from the time of service on the defendant. The first decree is *nisi* and does not permit either party to marry again for the term of three months from the date it is entered.[36]

## §259. Ohio.

*Causes:* (1) Husband or wife living at the time of the marriage; (2) wilful absence for three years; (3) adultery; (4) impotency; (5) extreme cruelty; (6) fraudulent marriage contract; (7) gross neglect of duty; (8) habitual drunkenness for three years; (9) imprisonment in the state penitentiary; (10) defendant obtaining a divorce in another state.

*Procedure:* The plaintiff must have been domiciled in the state for the term of one year before commencing the action. The cause may be tried after the expiration of five months from the time of service on the defendant, where the defendant is a non-resident of the state. If the defendant is a resident of the state, the cause may be tried after the expiration of three months from the date of service.[37]

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[35] Revised Laws of North Carolina, 1905; Session Laws of North Carolina, 1907-1913; Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97; Cook v. Cook, 80 S. E. 178; Pendergast v. Pendergast, 146 N. C. 225, 59 S. E. 692; McKenzie v. McKenzie, 69 S. E. 134.

[36] Revised Code of North Dakota, 1913; Weimer v. Weimer, 130 N. W. 1015; State v. Templeton, 123 N. W. 283, 25 L. R. A. (N. S.) 234; Mosher v. Mosher, 113 N. W. 99, 12 L. R. A. (N. S.) 820; Rindlaub v. Rindlaub, 125 N. W. 479.

## §260. Oklahoma.

*Causes:* (1) Former husband or wife living, undivorced; (2) abandonment for the term of one year; (3) adultery; (4) impotency; (5) pregnancy of the wife at the time of the marriage, by one other than the husband, without his knowledge; (6) extreme cruelty; (7) fraudulent contract of marriage; (8) habitual drunkenness; (9) gross neglect of duty; (10) conviction and imprisonment for felony subsequent to the marriage.

*Procedure:* The plaintiff must have had a domicile within the state for the period of one year before commencing the action. The trial may be had after the expiration of two months from the date of service on the defendant. The first decree is *nisi*, and does not become absolute or permit either party to marry again for the period of six months after rendition and filing.[38]

## §261. Oregon.

*Causes:* (1) Impotency at the time of the marriage, continuing to the date of the commencement of the suit; (2) adultery; (3) conviction of felony; (4) habitual gross drunkenness, contracted since the marriage, and continuing for the term of one year prior to the commencement of the action; (5) wilful desertion for one year; (6) cruel and inhuman treatment or personal indignities rendering life burdensome.

*Procedure:* The action may be commenced when the plaintiff has been domiciled within the state for the term of one year. Service must be made on the district attorney, as well as on the defendant, who must defend on behalf of the state. The trial may be had after the expiration of two months from the time of service on the defendant and district attorney. The decree does not allow either party to marry for the term of six months after it is rendered.[39]

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[37] General Code of Ohio, 1910; Julier v. Julier, 62 O. S. 90, 56 N. E. 661, 78 Am. St. R. 697; Coffman v. Coffman, 65 O. S. 61, 61 N. E. 155, 55 L. R. A. 794; Gilbert v. Gilbert, 94 N. E. 421.

[38] General Statutes of Oklahoma, 1909; Orcutt v. Orcutt, 108 Pac. 373; Newman v. Newman, 112 Pac. 1007; Fidelity v. Brown, 69 S. W. 915; Rogers v. Nichols, 15 Okla. 579, 83 Pac. 923.

[39] Lord's Oregon Laws, 1911; Session Laws, 1911-1913; Parish v. Parish, 52 Ore. 162, 96 Pac. 1066; McLennan v. McLennan 31

### §262. Pennsylvania.

*Causes:* (1) Impotency at the time of the marriage; (2) another husband or wife living, undivorced; (3) adultery; (4) desertion for two years; (5) cruel and barbarous treatment endangering the life of the wife; (6) consanguinity; (7) fraud, force or coercion; (8) conviction of infamous crime and imprisonment for two years thereunder.

*Procedure:* The action may be commenced after the plaintiff has been domiciled in the state for the period of one year. A jury trial may be demanded. The trial may be had after the expiration of six months from the date of service on the defendant.[40]

### §263. Porto Rico.

*Causes:* (1) Adultery; (2) conviction of felony, involving loss of civil rights; (3) habitual drunkenness, or the continued and excessive use of morphine, opium, or other narcotic; (4) cruel treatment or grave injury; (5) abandonment for more than one year; (6) absolute, perpetual and incurable impotency, arising after marriage; (7) attempt or connivance of husband or wife to corrupt their sons, or prostitute their daughters; (8) the proposal of the husband to prostitute the wife.

*Procedure:* The plaintiff must have been domiciled in Porto Rico for the period of one year before commencing the action, unless the cause arose while both parties were living there. The cause may be tried by the district court after the expiration of three months from the date of service on the defendant. A woman cannot again marry for three hundred and one days after being divorced.[41]

### §264. Rhode Island.

*Causes:* (1) When marriage is originally void, or voidable, or where either party deemed civilly dead, for crime, or from absence is presumed to be actually dead; (2) impotency; (3) adultery; (4) extreme cruelty; (5) wilful desertion for five

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Ore. 480, 50 Pac. 802, 65 Am. St. R. 835, 38 L. R. A. 863; Huffman v. Huffman, 47 Ore. 610, 86 Pac. 593, 114 Am. St. R. 943.

[40] Pennsylvania Statutes, 1911; McClain v. McClain, 40 Pa. Supr. Ct. 248; Heath v. Heath, 44 Pa. Sup. Ct. 118; Dulin v. Dulin, 33 Id. 4; Baughman v. Baughman, 34 Id. 271; Gordon v. Gordon, 208 Pa. 186, 57 Atl. 525.

[41] Revised Statutes and Code of Porto Rico, 1913.

years; (6) wilful desertion for a shorter period in the discretion of the court; (7) continued drunkenness; (8) excessive and intemperate use of morphine, opium, or chloral; (9) neglect and refusal of the husband, he having the ability, for at least one year to provide the wife with the necessaries of life; (10) gross misbehavior and wickedness repugnant to, and in violation of, the marriage covenant; (11) living separate and apart for the period of ten years, in the discretion of the court.

*Procedure:* The plaintiff must have had a domicile in the state for two years before commencing suit. The cause may be tried two months after service on the defendant. The first decree is *nisi*, and does not permit the parties to marry again for the period of six months after the decree *nisi*, or pending a decision on appeal if one is taken.[42]

## §265. South Carolina.

*Causes:* No absolute divorce can be granted in South Carolina for any cause. The state has no divorce laws, and the legislature is forbidden by the constitution of the state from passing any divorce legislation.[43]

## §266. South Dakota.

*Causes:* (1) Consanguinity nearer than second cousin; (2) fraudulent marriage contract; (3) force in bringing about the marriage; (4) duress in compelling marriage; (5) unsound mind of either party; (6) another husband or wife living undivorced; (7) non-age; (8) impotency; (9) adultery; (10) extreme cruelty, physical or mental; (11) wilful desertion for one year; (12) one party driving the other from home by cruelty, threats, stratagem, or fraud; (13) refusal of matrimonial intercourse for one year; (14) failure of the husband to support the wife for one year; (15) habitual intemperance for one year; (16) conviction of felony.

*Procedure:* The action may be commenced after the plaintiff has had a domicile in the state for the period of six months. The cause may be tried by the court, on the equity side, after the expiration of thirty days from the time of service on the defendant. If the cause occurred while the plaintiff was domiciled without the state, one year's domicile is required.

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[42] General Laws of Rhode Island, 1909; Thrift v. Thrift, 75 Atl. 484; Warren v. Warren, 78 Atl. 1041, 79 Atl. 678; Walker v. Walker, 78 Atl. 339.

[43] Messervey v. Messervey, 80 S. C. 277, 61 S. E. 442, 67 S. E. 130.

Annulment suits are governed by the provisions respecting citizenship, which, like domicile, is acquired in six months.[44]

## §267. Tennessee.

*Causes:* (1) Impotency and incapacity for procreation at the time of the marriage; (2) another marriage existing undissolved; (3) adultery; (4) wilful, malicious desertion for two years; (5) conviction of a crime which the laws of the state make infamous; (6) conviction of felony and sentence to the penitentiary; (7) attempting the life of the other by poison, or other means showing malice; (8) refusal of the wife to remove to the state with her husband, and absenting herself for two years; (9) pregnancy at the time of the marriage, by one other than the husband without his knowledge; (10) habitual drunkenness contracted after the marriage.

*Procedure:* The plaintiff must have been domiciled in the state for the period of two years before commencing the action. The trial may be had before the court of chancery after the expiration of three months from the date of service on the defendant. The guilty party cannot marry a paramour.[45]

## §268. Texas.

*Causes:* (1) Excesses, cruel treatment or outrages, rendering further living together intolerable; (2) where the wife is taken in adultery; (3) desertion for three years with intent to abandon; (4) abandonment of the wife by the husband and living in adultery with another woman; (5) conviction of felony after the marriage, and confinement in the penitentiary, provided no divorce shall be granted on this ground until twelve months after final conviction, and not if one party was convicted on the evidence of the other.

*Procedure:* The plaintiff must be domiciled in the state one year, and in the county where the suit is instituted six months, before the action can be commenced. The case must be tried at a regular term of the court before a jury. Trial may be had after the expiration of six months from the date of service on the defendant.[46]

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[44] Compiled Laws of South Dakota, 1911; Pugh v. Pugh, 25 S. D. 7, 124 N. W. 959, 32 L. R. A. (N. S.) 954; Reeves v. Reeves, 24 S. D. 435, 123 N. W. 869, 25 L. R. A. (N. S.) 574; Montague v. Montague, 25 S. D. 471, 127 N. W. 639, 30 L. R. A. (N. S.) 745.

[45] Session Laws of Tennessee, 1911; Willis vs. Willis, 104 Tenn. 382, 58 S. W. 301; Herscall v. Hafford, 107 Tenn. 355, 65 S. W. 423, 89 Am. St. R. 952; Carter v. Carter, 113 Tenn. 509, 82 S. W. 309; Newman v. Kimbro, 59 S. W. 1061; Sparks v. Sparks, 114 Tenn. 666, 88 S. W. 173.

## §269. Utah.

*Causes:* (1) Impotency of the defendant at the time of the marriage; (2) adultery committed by the defendant subsequent to the marriage; (3) wilful desertion for more than one year; (4) wilful neglect on the part of the husband to provide the necessaries of life for the wife for more than one year; (5) habitual drunkenness for more than one year; (6) cruel treatment causing great bodily injury or great mental distress.

*Procedure:* The action may be commenced after the plaintiff has been domiciled in the state for the period of one year. The trial may be had after the expiration of two months from the time of service on the defendant. The prosecuting attorney must defend for the state. The first decree is interlocutory, to be made final in six months. The parties are prohibited from marrying again for six months after the final decree, or, if an appeal is taken, until the decision of the appeal.[47]

## §270. Vermont.

*Causes:* (1) Adultery; (2) when either party is sentenced to confinement at hard labor in the state prison for life, or for three or more years, and is actually confined therein at the time of suit; (3) for intolerable severity in either party; (4) for wilful desertion for three consecutive years, or when either party is absent and unheard of for seven years; (5) where the husband, having the ability, grossly, wantonly and cruelly neglects to provide suitable maintenance for the wife.

*Procedure:* Unless the cause alleged for divorce was committed in the state, the action cannot be brought until the plaintiff has been domiciled in the state for the term of two years. If either party was living in the state when the offense was committed, only one year's domicile is required. The trial may be had after the expiration of four months from the time of service on the defendant. The guilty party cannot marry again for three years.[48]

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[46] Civil Statutes of Texas, 1912; Session Laws, Texas, 1913; Dickinson v. Dickinson, 138 S. W. 205; McMurray v. McMurray, 67 Tex. 666, 4 S. W. 357; Haymond v. Haymond, 74 Tex. 419, 12 S. W. 90; Young v. Young, 127 S. W. 898; Michael v. Michael, 34 Tex. Civil App 630, 79 S. W. 74.

[47] Compiled Laws of Utah, 1907; Session Laws of Utah, 1909; State v. Morse, 31 Utah, 213, 87 Pac. 705, 7 L. R. A. (N. S.) 1127; In Re Christensen's Est., 17 Utah, 412, 53 Pac. 1002, 79 Am. St. R. 794, 41 L. R. A. 504.

### §271. Virginia.

*Causes:* (1) Adultery; (2) impotency existing at the time of the marriage; (3) sentence to the penitentiary; (4) conviction of infamous offense prior to the marriage, without the knowledge of the other party; (5) where either party is charged with an offense punishable with death, or with confinement in the penitentiary, is a fugitive from justice, or has been absent two years; (6) desertion for three years; (7) pregnancy of the wife at the time of the marriage, without the knowledge or agency of the husband; (8) where the wife, prior to the marriage, was a prostitute, unknown to the husband, provided the husband has not cohabited with her after knowledge of such prostitution.

*Procedure:* The plaintiff must have had a domicile in the state for one year before commencing the action. The trial may be had before the court after the expiration of four months from the date of service on the defendant. Absolute divorce cannot be granted for desertion until it has existed in the state three years.[49]

### §272. Washington.

*Causes:* (1) Marriage through force or fraud where there has been no cohabitation; (2) adultery of either party; suit must be brought within one year after discovery; (3) impotency; (4) abandonment for one year; (5) cruel treatment or indignities producing physical injury; (6) habitual drunkenness or failure of the husband to support the wife without cause; (7) imprisonment in the penitentiary if action is brought during confinement; (8) after incurable chronic mania or dementia has existed for ten successive years, the court may, in its discretion, grant an absolute divorce.

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[48] Pub. Statutes of Vermont, 1906; Blondin v. Brooks, 76 Atl. 184; Pratt v. Pratt, 75 Vt. 432, 56 Atl. 86; Sargood v. Sargood, 77 Vt. 478, 61 Atl. 472.

[49] Virginia Code, 1904; Laws, 1908-1910; Willard v. Willard, 98 Va. 465, 36 S. E. 518; Haynor v. Haynor, 70 S. E. 531.

*Procedure:* The action cannot be commenced until the plaintiff has been domiciled in the state for one year. The trial may be had before the court after the expiration of three months from the date of service on the defendant. The prosecuting attorney must defend uncontested actions on behalf of the state. The decree of divorce must provide that neither party can marry again for six months after it is rendered, or, if an appeal is taken therefrom, not until the cause is finally determined on appeal.[50]

## §273. West Virginia.

*Causes:* (1) Adultery; (2) impotency existing at the time of the marriage and incurable; (3) sentence to confinement in the penitentiary; (4) conviction of infamous offense prior to the marriage, without the knowledge of the other party; (5) desertion for three years; (6) pregnancy of the wife at the time of the marriage, without the husband's knowledge or agency; (7) the wife having been a notorious prostitute prior to the marriage, without the husband's knowledge; (8) the husband having been a notoriously licentious person before the marriage, without the knowledge of the wife; but no divorce can be granted for conviction of infamy, prostitution, or licentiousness, or antenupital pregnancy, where there has been cohabitation after knowledge of the facts.

*Procedure:* The action may be begun after either party has had a domicile in the state for the period of one year. The trial may be had after the expiration of four months from the time of service on the defendant. Adultery, prior unchastity, impotency, felony, and desertion for three years, are the only causes for absolute divorce. Otherwise, limited divorce must first be obtained which may be the basis of an absolute divorce if the parties do not become reconciled within two years.[51]

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[50] Washington Revised Code; Statutes, 1910; Bickford v. Bickford, 107 Pac. 186; In re Hallopeter, 52 Wash. 41, 100 Pac. 159, 132 Am. St. R. 945; Pierce v. Pierce, 109 Pac. 45; Bucholz v. Bucholz, 115 Pac. 88; State v. Supr. Ct. 104 Pac. 701; State v. Lloyd, 55 Wash. 347, 104 Pac. 771, 25 L. R. A. (N. S.) 387; State v. Wheeler, 43 Wash. 183, 86 Pac. 394; Pringle v. Pringle, 104 Pac. 159; Lee v. Lee, 19 Wash. 355, 53 Pac. 349; Wheeler v. Wheeler, 38 Wash. 491, 80 Pac. 762; Piper v. Piper, 46 Wash. 671, 91 Pac. 189.

## §274. Wisconsin.

*Causes:* (1) Adultery; (2) impotency; (3) sentence subsequent to marriage to imprisonment for three years or more, provided suit is brought during confinement; (4) where the husband treats the wife in a cruel and inhuman manner, or the wife so treats the husband, or is a drunkard; (5) habitual drunkenness for one year; (6) voluntary living apart for the period of five years next preceding the commencement of the action.

*Procedure:* In the state of Wisconsin an entirely new law governing domicile, and procedure in cases for divorce and annulment of marriage, was enacted by the legislature of 1909. Suit to annul a marriage may be begun when the plaintiff has been domiciled in the state one year. In actions for divorce, unless one of the parties was domiciled in the state when the cause was committed and remained so until the commencement of the action, a suit for a divorce cannot be commenced until the plaintiff has been domiciled in the state for two years.

The prosecuting attorney must resist all undefended applications. At the trial, which may be had two months after service on the defendant, an interlocutory divorce is entered, and at the end of one year, if an appeal is not pending, or the interlocutory judgment reversed or set aside, an absolute divorce may be granted upon proper application. Where the marriage is annulled, the first decree is also interlocutory, to be made absolute in the same time and on the same conditions as in divorce cases.[52]

## §275. Wyoming.

*Causes:* (1) Adultery; (2) impotency at the time of the marriage, continuing to the time of the action for divorce is commenced; (3) conviction of felony and sentence thereunder in any prison; (4) desertion for the period of one year; (5) habitual drunkenness; (6) extreme cruelty; (7) failure of husband, having the ability, to provide for the wife for one year; (8) indignities rendering conditions intolerable.

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[51] West Virginia Statutes, 1914; Hartigan v. Hartigan, 65 W. Va. 471, 64 S. E. 726; Reynolds v. Reynolds, 69 N. E. 381; Maxwell v. Maxwell, 67 W. Va. 119, 71 S. E. 571, 27 L. R. A. (N. S.) 712; Bacon v. Bacon, 70 S. E. 762; Trough v. Trough, 59 W. Va. 464, 53 S. E. 630, 115 Am. St. R. 940, 4 L. R. A. (N. S.) 1185.

[52] Revised Statutes of Wisconsin, 1913; Yates v. Yates, 147 N. W. (Wis.) 60.

*Procedure:* Unless the marriage was celebrated in the state, and the plaintiff has resided therein from the date of the marriage to the date of the commencement of the suit, the plaintiff must have been domiciled in the state for the period of one year. The trial may be had in about three months from the time of service on the defendant. All divorce judgments are interlocutory, and do not dissolve the marriage, nor permit either party to marry again until the expiration of one year from the date of the decree.[53]

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[53] Wyoming Compiled Statutes, 1910; Duekstad v. Duekstad, 17 Wyo. 511, 100 Pac. 112, 129 Am. St. R. 1138.

## CHAPTER XXIII.

## DIVORCE AND ANNULMENT OF MARRIAGE IN MICHIGAN.

§276. Jurisdiction.
§277. Marriages Void without Divorce—Legitimacy of Issue.
§278. Marriages Procured by Force or Fraud.
§279. Actions to Annul Void Marriage.
§280. Sufficiency of Evidence.
§281. Actions to Affirm Marriage.
§282. Sentence to Imprisonment for Life.

### §276. Jurisdiction.

In the State of Michigan the several circuit courts in chancery have jurisdiction to grant decrees of absolute divorce, limited divorce, and decrees annulling or affirming marriages, for causes specified in the statutes.

The statute declares certain marriages, solemnized within this state, to be absolutely void without any decree of divorce or other legal process.[1] The statute also provides for actions for the annulment of a marriage supposed to be void, or the validity of which is doubted, as well as proceedings to affirm such marriages.[2] There is a clear distinction between actions for divorce, and actions for the annulment of marriages.

An action for divorce proceeds upon the theory of a valid marriage, which the plaintiff asks to have dissolved, and no decree of divorce can be granted without satisfactory proof of a valid marriage.

An action to annul a marriage proceeds upon the theory that the supposed marriage is void, and that no valid marriage between the parties ever existed.

### §277. Marriages Void without Divorce—Legitimacy of Issue.

All marriages which are prohibited by law on account of consanguinity or affinity between the parties, or on account of either of them having a former husband or wife living and undivorced, and all marriages solemnized when either of the parties was insane or an idiot, if solemnized within this state, are absolutely void without any decree of divorce or other legal process.[3] But the issue of such marriages, except when the marriage was contracted while either of the parties thereto had a former husband or wife living and undivorced, must be deemed legitimate.

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[1] C. L. 1915, (11392); Howell, 2nd. Ed., §11453.

[2] C. L. 1915, (11394); Howell, 2nd. Ed., §11455. Jurisdiction over divorce is purely statutory and not within the original cognizance of the courts of equity. Baugh v. Baugh, 37 Mich. 61; Haines v. Haines, 35 Mich. 145.

But marriages solemnized when either of the parties was under the legal age of consent are not absolutely void, although the statute prohibits such marriages. The statute provides that if the parties separate during such non-age, and do not cohabit together afterwards, such marriage shall be deemed void, without any decree of divorce or other legal process.[4]

Such a marriage may be annulled by the mutual consent of both parties, or at the election of the party under the age of legal consent, but not at the election of the party of competent age.[5]

When one of the parties is under the legal age of consent, the marriage is voidable only;[6] but will be void if the party under age withdraws and refuses to cohabit before attaining the age of consent.[7]

## §278. Marriages Procured by Force or Fraud.

In case the consent of one of the parties is obtained by force or fraud, and there is no subsequent voluntary cohabitation of the parties, the marriage is deemed void without any decree of divorce or other legal process.[8] Where a youth was frightened into a marriage on a charge of bastardy, the marriage was annulled for duress.[9]

Force or fraud which will invalidate a marriage must usually be such as to negative any consent to be married at all, without reference to previous inducements. The commoner cases are duress, surprise or stratagem in procuring the marriage itself to be carried out; and the fraud or duress must usually be nearly, if not absolutely, coincident in time with the marriage, and must operate to destroy that intelligent consent which is required for the marriage itself, rather than the preliminary engagement.[10]

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[3] C. L. 1915, (11392); Howell, 2nd. Ed., §11453; In Re Fitzgibbons' Estate, 162 Mich. 416, 419-421, 127 N. W. 313.

[4] C. L. 1915, (11393); Howell, 2nd. Ed., §11454.

[5] People v. Slack, 15 Mich. 193.

[6] Bonker v. People, 37 Mich. 7.

[7] People v. Bennett, 39 Mich. 209. The legal age of consent is fixed by statute at the age of eighteen years for males and sixteen years for females. C. L. 1915, (11362); Howell, 2nd. Ed. §11423.

[8] C. L. 1915, (11393); Howell, 2nd. Ed., §11454.

[9] Smith v. Smith, 51 Mich. 607, 17 N. W. 76.

To warrant a decree annulling a marriage for fraud, there must be satisfactory evidence to sustain the charge, regardless of the declarations, confessions or admissions of the parties.[11] The statute forbids decrees for divorce, or for annulment solely on declarations, confessions or admissions of the parties, but this prohibition does not exclude such confessions or admissions, although the court must require other evidence of the facts alleged in the bill to justify a decree.[12]

A marriage may be annulled for fraud, as where a woman induces a man to marry her by representing herself to be pregnant by him, knowing that her pregnancy was by another.[13] But in such case the man must have been actually deceived by the representation, must have believed them, and must move diligently when he discovers their falsity. Chastity is not an essential requisite to a valid marriage, and antenuptial incontinence is not always a ground for divorce or for a decree of annulment.[14]

## §279. Actions to Annul Void Marriage.

When a marriage is supposed to be void, or its validity is doubtful, for any of the causes mentioned in the statute, either party, except in cases where a contrary provision is made, may file a bill of complaint in the circuit court in chancery in the county where the parties or one of them reside, for annulling the same, and the same proceedings are had as in case of a bill filed in the same court for a divorce. Upon sufficient proof of the nullity of the marriage, it will be declared void by a sentence or decree of annulment.[15]

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[10] Leavitt v. Leavitt, 13 Mich. 452.

[11] Dawson v. Dawson, 18 Mich. 335.

[12] C. L. 1915, (11428); Howell, 2nd Ed., §11489; Dawson v. Dawson, 18 Mich. 335.

[13] Sissung v. Sissung, 65 Mich. 168, 31 N. W. 770.

[14] Leavitt v. Leavitt, 13 Mich. 452.

[15] C. L. 1915, (11394); Howell, 2nd. Ed., §11455.

It will be noticed that the statute requires the same proceedings to be had in actions to annul a marriage as in actions for divorce; hence, in an action instituted by the husband to procure the annulment of the marriage, the court in which the action is pending may require the husband to pay money to the wife to enable her to carry on the suit.[16]

## §280. Sufficiency of Evidence.

A marriage should not be annulled unless the evidence is so clear and convincing that no other conclusion can be drawn from it than that the facts necessary to make the marriage illegal actually exist. Every consideration of public policy and humanity admonishes us that a contract so essentially connected with the peace and happiness of individuals and families, and with the well-being of society, should not be annulled unless the proof of the necessary facts is clear and convincing. The law not only favors, but encourages marriage, and, when once solemnized according to the forms of law, they will not be declared void upon anything short of clear and convincing testimony.[17]

## §281. Actions to Affirm Marriage.

The statute also provides that "when the validity of any marriage shall be denied by either of the parties, the other party may file a bill or petition in the manner aforesaid, for affirming the marriage; and upon due proof of the validity thereof, it shall be declared valid, by a decree or sentence of the court; and such decree, unless reversed on appeal, shall be conclusive upon all persons concerned."[18]

A court of equity will entertain an action to affirm a common law marriage under the provisions of this section, but the proofs must clearly show an agreement between the parties presently to take each other as husband and wife, and such agreement must be followed by cohabitation in the relation of husband and wife, or no decree affirming such marriage will be granted.[19]

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[16] Webb v. Wayne Circuit Judge, 144 Mich. 674, 108 N. W. 358; Goldsmith v. Goldsmith, 6 Mich. 285; Ross v. Ross, 47 Mich. 185, 10 N. W. 193; Haines v. Haines, 35 Mich. 138; Story v. Story, Walk. Ch. 421.

[17] VanHaaften v. VanHaaften, 139 Mich. 479, 102 N. W. 989; Cole v. Cole, 5 Sneed (Miss) 59; Powell v. Powell, 27 Miss. 783; Slais v. Slais, 9 Mo. App. 97; Kern v. Kern, 51 N. J. Eq. 582.

[18] C. L. 1915, (11395); Howell, 2nd. Ed., §11456.

### §282. Sentence to Imprisonment for Life.

"When either party shall be sentenced to imprisonment for life in any prison, jail or house of correction, the marriage shall be thereby absolutely dissolved, without any decree of divorce or other legal process, and no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights."[20]

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[19] Judson v. Judson, 147 Mich. 518, 11 N. W. 78; Hutchins v. Kimmell, 31 Mich. 126; Lorimer v. Lorimer, 124 Mich. 631.

[20] C. L. 1915, (11396); Howell, 2nd. Ed., §11457.

## CHAPTER XXIV.

## ADULTERY AS A CAUSE FOR DIVORCE.

§283. Adultery.
§284. Bill of Complaint.
§285. Disposition and Opportunity.
§286. Professional Calls.
§287. Facts from which Adultery may be Inferred.
§288. Facts not Sufficient to Establish Adultery.
§289. Character of Witnesses to Prove Adultery—Particeps Criminis—Prostitutes and Procurers—Detectives.
§290. Prostitutes and Procurers—Detectives.

### §283. Adultery.

An absolute divorce from the bonds of matrimony may be decreed by the circuit court in chancery of the county where the parties or one of them reside, on the application by petition or bill of the aggrieved party, whenever adultery has been committed by either party to the marriage.[1]

In an action for divorce on the ground of adultery, there should be required a strict adherence to settled practice and to all of the requirements of the statute. It is easy to bring such a charge, and in many cases to support it by evidence of circumstances perfectly innocent in themselves when fully explained, and yet capable of presenting a suspicious appearance, and parties so often resort to it with full knowledge of its unfounded nature, relying upon being able to present a plausible showing which the accused party may be unable to disprove fully, that the court should always require a strict adherence to the rules of practice, and should deny relief unless the guilt of the accused party is clearly established.[2]

### §284. Bill of Complaint.

The time, place and circumstances or occasion of the act charged, and the name of the guilty participator, if known, must be set forth definitely, and with reasonable particularity and distinctness.[3] An allegation that the defendant lived in open and notorious adultery, stating the time, place, and with whom, is sufficient.[4]

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[1] C. L. 1915, (11397); Howell, 2nd. Ed., §11458.

[2] Green v. Green, 26 Mich. 437.

The bill must be sworn to, and any amendments made to it must also be sworn to in the same manner as the original bill.[5]

Proof of facts which are not alleged in the bill cannot be made available.[6] The adultery charged therein must be proved by competent evidence, and not by scandal merely, nor by reputation alone. While reputation is not sufficient, it may be received in aid of, and as incident to, substantive proof.[7] Proof of adulterous acts not alleged cannot avail and in fact ought not to be allowed to be proved.[8]

It is not necessary that there shall be absolute direct evidence of the fact. The charge may be proved by circumstantial evidence the same as any other fact. There may be no direct proof of any single fact sufficient to afford a conclusive inference, but if when all the circumstances are combined, and the natural inferences and presumptions allowed their due weight, the proof so presses and convinces that is difficult to reject belief, it is sufficient.[9] It will be presumed that licentious persons, holding and expressing loose and depraved notions in regard to the marriage relation, will commit such offenses as they have opportunity for, when consorting together.[10]

But where adultery is sought to be made out by proof of freedom of manners, unchastity should not be inferred from lack of refinement, if the conduct of the party accused is not such as to offend the general sentiment among the class of people with whom the parties habitually associate. The law does not require a higher standard of behavior than that which virtuous people in the same position accept for themselves and their associates.[11]

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[3] Dunn v. Dunn, 11 Mich. 284; Shoemaker v. Shoemaker, 20 Mich. 222; Bennett v. Bennett, 24 Mich. 482; Green v. Green, 26 Mich. 437; Randall v. Randall, 31 Mich. 194; Herrick v. Herrick, 31 Mich. 298.

[4] Marble v. Marble, 36 Mich. 386.

[5] Green v. Green, 26 Mich. 437; Briggs v. Briggs, 20 Mich. 40.

[6] Green v. Green, 26 Mich. 437.

[7] Soper v. Soper, 29 Mich. 305; Marble v. Marble, 36 Mich. 386.

[8] Dunn v. Dunn, 11 Mich. 284; Shoemaker v. Shoemaker, 20 Mich. 222; Bennett v. Bennett, 24 Mich. 482; Randall v. Randall, 31 Mich. 194; Herrick v. Herrick, 31 Mich. 298.

[9] Marble v. Marble, 36 Mich. 386.

[10] McClung v. McClung, 40 Mich. 493.

A *particeps criminis* may be a competent witness for a plaintiff in an action for divorce on the ground of adulfery, but the testimony of such witness should be supported by some corroborating evidence.[12] A divorce for adultery should not be granted on the unsupported evidence of one who swears to open and shameless conduct between himself and the defendant, and whose cross-examination shows him to be guilty of manifest falsehood under oath in material particulars, and whom the witnesses brought to corroborate him rather contradict than confirm.[13]

It is improper to call children of the parties of tender age to testify to facts tending to show want of chastity of their parents, and a divorce will not be granted where the case depends on such testimony. Such a course is not only a great wrong to young children, as it touches them in their natural affections, but it also tends to destroy their purity of mind and conduct, and leads them into depraved notions.[14]

In an action for divorce on the ground of adultery, the time when the plaintiff first discovered or had knowledge of the fact should be shown, and also whether there has been a condonation by voluntary cohabitation since.[15]

## §285. Disposition and Opportunity.

It is always competent, in an action for divorce on the ground of adultery, to prove an adulterous disposition on the part of the defendant and the alleged paramour, and where such adulterous disposition or inclination is shown, and it also appears that at the time and place alleged there was an opportunity for them to commit the offense, such facts are sufficient to establish adultery.[16]

But an adulterous disposition is not necessarily established by the existence of undue familiarity between the accused parties, and proof of opportunity alone, in the absence of proof of adulterous inclination, does not establish adultery.[17]

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[11] Bishop v. Bishop, 17 Mich. 211.

[12] Emmons v. Emmons, Walker's Ch. 532.

[13] Herrick v. Herrick, 31, Mich. 298.

[14] Kneale v. Kneale, 28 Mich. 344; Crowner v. Crowner, 44 Mich. 180, 6 N. W. 198.

[15] Emmons v. Emmons, Walker's Ch. 532.

[16] 14 Cyc. 694; Blake v. Blake, 70 Ill. 618; Inskeep v. Inseepk, 5 Iowa 204; McClung v. McClung, 40 Mich. 493; Black v. Black, 30 N. J. Eq. 228; Freeman v. Freeman, 31 Wis. 235.

## §286. Professional Calls.

A charge of adultery is not sustained against a wife upon evidence that she had placed herself in the hands of an irregular physician, for treatment for some female difficulty, and that on several days a physical examination was made by him in a room with the door bolted.[18] Nor will adultery readily be inferred from familiarity and improper conduct with near relations;[19] nor is evidence of frequent private interviews with a clergyman sufficient to establish adultery.[20]

## §287. Facts from which Adultery may be Inferred.

It is not necessary that there should be direct proof of sexual intercourse to establish the fact of adultery. The fact may be inferred from proof of such conduct as would lead to the conclusion that the offense had actually been committed. Adultery may be established by the fact that the parties occupied the same room at night,[21] or the same bed,[22] but the incriminating circumstances may be explained.[23]

Frequent visits at a house of ill-fame, in the absence of explanation consistent with innocence, is sufficient to establish the fact of adultery.[24] Adultery may also be established by proof of pregnancy of a wife under circumstances precluding the possibility of the husband being the author of her pregnancy; but the husband is presumed to be the father of the child if he had access to his wife during the required period.[25] Proof of a subsequent bigamous marriage is not sufficient without proof of cohabitation.[26] It is prima facie evidence of adultery that a husband, long after marriage, is afflicted with a venereal disease.[27]

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[17] Osborne v. Osborne, 44 N. J. Eq. 257, 9 Atl. 698; Blake v. Blake, 70 Ill. 618; Burk v. Burk, Kan. 307.

[18] Stuart v. Stuart, 47 Mich. 566, 11 N. W. 388.

[19] Peavey v. Peavey, 76 Iowa 443, 41 N. W. 67.

[20] Freeman v. Freeman, 31 Wis. 235.

[21] Names v. Names, 67 Iowa 383, 25 N. W. 671.

[22] Fischer v. Fischer, 131 Mich. 441, 91 N. W. 633; Shufield v. Shufield, 86 Md. 519, 39 Atl. 416.

[23] Cave v. Cave, 39 N. J. Eq. 148.

[24] Mosser v. Mosser, 29 Ala. 313; Peavey v. Peavey, 76 Iowa, 443, 41 N. W. 67.

[25] Cross v. Cross, 3 Paige (N. Y.) 139, 23 Am. Dec. 778.

[26] Clapp v. Clapp, 97 Mass. 531.

[27] Johnson v. Johnson, 18 Wend. (N. Y.) 637.

### §288. Facts not Sufficient to Establish Adultery.

A man will not be presumed to have committed adultery while his wife and child were in the same bed with him.[28] Adultery will not be presumed from the fact of a female servant remaining in a room with the defendant at night, where the evidence satisfactorily shows that she was the only servant about the house, and that her services were required for the purpose of adjusting poultices on an eruption for which he was undergoing treatment.[29]

A visit to a house of ill fame may be explained by evidence showing that it was made through ignorance or mistake as to the character of the house, or because of the fraudulent inducement of the plaintiff or his agents.[30] The inference of guilt is stronger where a married woman enters a house of ill fame, with knowledge of its character, with a man not her husband.[31] But the fact that the defendant and her house are of ill repute is not of itself sufficient to entitle the plaintiff to a divorce on the ground of adultery.[32]

### §289. Character of Witnesses to Prove Adultery—Particeps Criminis.—Prostitutes and Procurers—Detectives.

In an action for divorce on the ground of adultery, the alleged paramour of the defendant is a competent witness to prove the fact of adultery,[33] but such testimony is liable to grave suspicion, and should be acted upon with extreme caution.[34] Ordinarily, unless such testimony is corroborated, it is not sufficient to authorize a decree of divorce.[35] It has been held, however, that the requirement as to corroboration is rather a rule of precaution on the part of the court than an arbitrary rule of law. It appears to be founded mainly upon the inability of the party charged with adultery to contradict the testimony of the alleged paramour, because of the common law incompetency of husband and wife to testify in actions for divorce. Where by statute either spouse may be a witness against the other in divorce cases, the force of the reason requiring corroboration is materially weakened, and the sufficiency of the alleged paramour's testimony must depend mainly upon the degree of credibility the judge or jury trying the case see fit to give it.[36] The rule requiring corroboration does not apply where he denies the alleged criminal act.[37] The facts and circumstances relied on to corroborate him, where he testifies on behalf of the plaintiff, must be material, and such as have a tendency to prove that the adultery was in fact committed.[38]

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[28] Rickard v. Rickard, 9 Ore. 168.

[29] Peavey v. Peavey, 76 Iowa 443, 41 N. W. 67.

[30] Cave v. Cave, 39 N. J. Eq. 148; Latham v. Latham, 30 Gratt. (Va.) 307.

[31] Stackhouse v. Stackhouse, 36 Atl. (N. J.) 884; Matchin v. Matchin, 6 Pa. St. 332, 47 Am. Dec. 466.

[32] Miller v. Miller, 20 N. J. Eq. 216.

[33] Moulton v. Moulton, 13 Me. 110; Mayer v. Mayer, 21 N. J. Eq. 246; Moller v. Moller, 115 N. Y. 466, 22 N. E. 169; all holding that if no other evidence is obtainable it should be considered at its true worth, in connection with all the other circumstances.

[34] Whale v. Whale, 71 Ill. 510; Lewis v. Lewis, 9 Ind. 105; Herrick v. Herrick, 31 Mich. 298.

[35] Payne v. Payne, 42 Ark. 235; Evans v. Evans, 93 Ky. 510, 20 S. W. 605; Herrick v. Herrick, 31 Mich. 298; Bishop v. Bishop, 17 Mich. 211; Emmons v. Emmons, Walker's Ch. 532; Hedden v. Hedden, 21 N. J. Eq. 61; Cline v. Cline, 16 Pac. 282; Simons v. Simons, 13 Tex. 468.

## §290. Prostitutes and Procurers—Detectives.

Prostitutes and persons who procure adultery to be committed are competent witnesses to the fact of adultery, but their testimony should be received with great caution, and should be fully corroborated.[39]

Detectives or other persons employed for hire, to watch and detect a husband or wife suspected of adultery, are competent witnesses. Their testimony should not be absolutely rejected because of the fact of their employment for that purpose, but the court should scrutinize it carefully and receive it with great caution. Ordinarily such testimony should be corroborated, either by the facts and circumstances in evidence, or by the direct testimony of other witnesses, or by both.[40] The reason for the rule seems to be that when a man sets himself up as a hired discoverer of supposed delinquincies, and the amount of his pay depends upon the extent of his employment, and the extent of his employment depends upon the discoveries he is able to make, he then becomes a most dangerous instrument. The temptation is before him to advance his own interests regardless of those just and humane principles which should actuate human conduct.[41]

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[36] Steffens v. Steffens, 16 Daly, (N. Y.) 366, 11 N. Y. Supp. 424.

[37] Pollock v. Pollock, 71 N. Y. 137; Crary v. Crary, 18 N. Y. Supp. 753.

[38] Groger v. Groger (N. J.), 45 Atl. 349.

[39] Paul v. Paul, 37 N. J. Eq. 23; Waggoner v. Waggoner (Md.), 10 Atl. 221; Clare v. Clare, 19 N. J. Eq. 37; Winston v. Winston, 165 N. Y. 553, 59 N. E. 273; McCarthy v. McCarthy, 143 N. Y. 235, 38 N. E. 288; Moller v. Moller, 115 N. Y. 466, 22 N. E. 169.

[40] Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 57 Am. St. R. 95, 34 L. R. A. 449; Blake v. Blake, 70 Ill. 618; Van Voorhis v. Van Voorhis, 94 Mich. 60, 53 N. W. 964; Pullen v. Pullen, 46 N. J. Eq. 318, 20 Atl. 393; Hurtzig v. Hurtzig, 44 N. J. Eq. 329, 15 Atl. 537; Cave v. Cave, 39 N. J. Eq. 148; Cline v. Cline (Oreg.), 16 Pac. 282; Engelman v. Engleman, 97 Va. 487, 34 S. E. 50;

The right to a divorce for adultery will be barred if the plaintiff consents to the employment of a person to allure the defendant into the commission of the offense for which the action is brought. In other words, a plaintiff cannot obtain redress in a court of equity for an act of adultery brought about by himself or his own agent.[42]

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Throckmorton v. Throckmorton, 86 Va. 768, 11 S. E. 289.

[41] Blake v. Blake, 70 Ill. 618, 622.

[42] Dennis v. Dennis, 68 Conn. 186, 34 L. R. A. 449; Williamson v. Williamson, L. R. Prob. Div. 76.

## CHAPTER XXV.

## PHYSICAL INCOMPETENCY AS A CAUSE FOR DIVORCE.

§291. Physical Incompetency.
§292. Impotency.
§293. Impotency Caused by Self Abuse.
§294. Burden of Proof.
§295. Refusing Means of Cure.
§296. Marriage Voidable, Not Void.

### §291. Physical Incompetency.

The Michigan statute provides that decrees of absolute divorce may be granted "when one of the parties was physically incompetent at the time of the marriage."[1] Antenuptial impotency is not a ground for divorce unless made so by statute.[2]

Many of the states have enacted laws similar to the Michigan statute authorizing divorce on the ground of physical incompetency or impotency existing at the time of the marriage. Statutes authorizing divorce on the ground of physical incapacity are generally construed to include impotency as well as physical deformity. The terms "physical incompetency" and "physical incapacity," frequently met with in divorce proceedings, mean a want of physical power to consummate the marriage. The act of gratifying sexual desire is the consummation of marriage, inability to accomplish which, when it proceeds from incurable physical imperfection or malformation, is precisely what the statute means and expresses by the terms of "physically incapacitated" and "physical incompetency," "Barrenness," however, is in no sense the synonym of "impotency."[3]

### §292. Impotency.

Impotency as a ground for divorce must have existed at the time of the marriage and must have been unknown to the other party to the marriage contract. It must be incurable, and amount to an incapacity which admits neither copulation or procreation; the copulation contemplated being complete and natural, not partial, imperfect or unnatural.[4]

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[1] C. L. (1915, (11397); Howell, 2nd. Ed., §11458.

[2] Burtis v. Burtis, 14 Am. Dec. 563; Griffith v. Griffith, 162 Ill. 368, 44 N. E. 820; Payne v. Payne, 46 Min. 467, 49 N. W. 230, 24 Am. St. R. 240.

[3] Anonymous, 89 Ala. 291, 7 So. 100, 18 Am. St. R. 116, 7 L. R. A. 425.

### §293. Impotency Caused by Self Abuse.

In some of the states a wife may be entitled to a divorce for impotency of the husband, where, through long continued indulgence in self abuse, he has become so perverted in mind and body as to be deprived of the desire and ability to perform the act of coition, and so depraved that he cannot or will not exercise moral restraint over himself.[5]

### §294. Burden of Proof.

The burden of proof is on the complaining party to establish both the incurable nature of the impotency or physical incapacity, and its existence at the time of the marriage.[6] But when the impotency is natural it will be presumed to have existed at the time of the marriage, although when it is brought into existence by physical, accidental causes, the contrary presumption seems to prevail.[7]

If, therefore, capacity is probable, or if though incapacity once existed it has been removed, or if it is capable of being removed and full capacity restored, no decree of divorce for such incapacity or impotency should be granted.[8]

### §295. Refusing Means of Cure.

It has been held that if the impediment is of such nature that it can be removed by a surgical operation, without serious danger, it is not grounds for a decree, although the party refuses to submit to such operation. The reason for this rule seems to be that otherwise one might be impotent or capable at his own election, and the marriage would be invalid or good as he might will.[9] It has been said upon good authority, and what appears to be sound reasoning, "that this doctrine cannot be carried far, because no one can be required to run the hazard of life, or to submit to means of cure which in good faith he fears, however honestly or intelligently prescribed."[10]

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[4] Griffith v. Griffith, 162 Ill. 368, 44 N. E. 820; J. G. v. H. G. 33 Md. 401, 3 Am. R. 183; Payne v. Payne, 46 Minn. 467, 49 N. W. 230, 24 Am. St. R. 240. Lorenz v. Lorenz, 93 Ill. 367; Berdolt v. Berdolt, 56 Neb. 792, 77 N. W. 399; Bascomb v. Bascomb 25 N. H. 267.

[5] Griffeth v. Griffeth, 162 Ill. 368, 44 N. E. 320.

[6] Newell v. Newell, 9 Paige, 25; Devanbaugh v. Devanbaugh, 5 Paige 554.

[7] 1 Bishop on Marriage and Divorce, 6th Ed., §322; Tierney v. Tierney, 169 Mich. 600, 135 N. W. 654.

[8] Wilde v. Wilde, 2 Lee 578, 580, 586; 1 Fras. Dom. Rel. 55.

### §296. Marriage Voidable, Not Void.

Those impediments to the consummation of the marriage, designated "physical incompetency," "physical incapacity," and "impotency," do not render the marriage void. Until decree is passed, during the life-time of both parties, the marriage is good for all purposes; but the decree of annulment makes it void from the beginning.[11]

Statutes which mention impotency, physical incapacity and physical incompetency as ground for divorce are generally silent as to whether the decree operates to annul the marriage from the beginning or from the date of its rendition. Mr. Bishop says that "it is plain that the principles of law applying to the case leaves it here as in England. The marriage was voidable only; the decree renders it void from the beginning."[12]

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[9] Devenbaugh v. Devanbaugh, 6 Paige 175; Fras. Dom. Rel. 55.

[10] 1 Bishop on Mar. and D. P. 287, §332.

[11] 1 Bishop on Mar. and Div., 6th Ed., P. 295.

[12] 1 Bishop on Mar. and Div., P. 295; Smith v. Morehead, 6 Jones Eq. 360; Bascomb v. Bascomb, 5 Foster (N. H.) 267, 273.

## CHAPTER XXVI.

## IMPRISONMENT AS A CAUSE FOR DIVORCE.

§297. Imprisonment for Three Years or More.
§298. Effect of Pardon.
§299. Conviction of Crime.
§300. Conviction in Another State.
§301. Effect of Indeterminate Sentence.
§302. In case of Appeal.

### §297. Imprisonment for Three Years or More.

The Michigan statute also provides that a divorce from the bonds of matrimony may be decreed "when one of the parties has been sentenced to imprisonment in any prison, jail or house of correction, for three years or more; and no pardon granted to the party so sentenced, after a divorce for that cause, shall restore such party to his or her conjugal rights."[1]

### §298. Effect of Pardon.

It is only when a decree of divorce has been granted for that cause, before a pardon, that the parties are precluded from being restored to their conjugal rights. If a pardon has been granted before any application for divorce is made, the conjugal rights of the parties would seem to remain the same as before; and if after the pardon the parties resume the marriage relation, the cause for which a divorce might have been granted is condoned or at least no longer exists.

### §299. Conviction of Crime.

By statute in some of the states, conviction of felony or infamous crime is made a cause for absolute divorce.

The statute of Michigan, however, does not recognize conviction, or any term of imprisonment for less than three years, a ground for divorce, either absolute or limited, and, except as declared by statute, no divorce can be had for any such cause.

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[1] C. L. (8621); Howell, 2nd. Ed., §11458; Johnson v. Johnson, Walker's Ch. 309.

It is only for those causes which the statute declares to be ground for divorce that a decree or judgment of divorce can be granted.[2] Consequently, in this state, no matter how infamous may be the crime of which one of the parties to a marriage may be convicted, and however great may be the penalty which the court may in its discretion impose, the other party cannot be relieved from the marriage obligations unless such conviction results in a sentence of imprisonment in some prison, jail or house of correction for the period of three years or more.

## §300. Conviction in Another State.

In those states where the statute declares conviction of felony or other infamous crime to be a ground of divorce, unless otherwise expressed, a conviction without the state is not a cause for divorce.[3] A conviction in the Federal court for the district of Massachusetts, and imprisonment in the state prison in that state under sentence of that conviction, do not constitute a cause of divorce in New Hampshire.[4]

## §301. Effect of Indeterminate Sentence.

We are not aware of any adjudicated case in Michigan where one of the parties to a divorce proceeding has been sentenced under the indeterminate sentence statute, the maximum of which is more than three years and the minimum less than that period. It would seem, however, that the fact that the term of imprisonment, under certain conditions, may be more than three years, and the uncertainty that it would be less than that period, ought to bring such a case within the statute authorizing a divorce when one of the parties has been sentenced to imprisonment for three years or more. In Massachusetts, under an indeterminate sentence law very similar to the Michigan statute, it was held that where a husband has been sentenced to the state prison for a maximum term of six years and a minimum term of three years, under a statute authorizing a prison commission to parole a prisoner upon certain conditions after the expiration of the minimum term, and to rearrest him if the conditions are violated prior to the expiration of the maximum term, the wife may obtain a divorce under the statute giving a wife a right to a divorce where the husband is sentenced to imprisonment for five years or more.[5]

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[2] Sharman v. Sharman, 18 Tex. 521.

[3] Leonard v. Leonard, 151 Mass. 151, 23 N. E. 732, 21 Am. St. R. 437, 6 L. R. A. 632; Klutts v. Klutts, 5 Sneed (Tenn.) 423; Martin v. Martin, 47 N. H. 53.

[4] Martin v. Martin, 58 N. H. 52.

## §302. In Case of Appeal.

For the purpose of divorce, under the statute making sentence of one of the parties to the marriage to imprisonment for a certain term a ground for divorce, such sentence cannot be urged by the other party as a cause of divorce pending an appeal from such sentence, before such conviction and sentence become final by affirmance in the appellate court.[6]

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[5] Oliver v. Oliver, 169 Mass. 592, 48 N. E. 843.

[6] Rivers v. Rivers, 60 Iowa, 378, 14 N. W. 774; Vinsant v. Vinsant, 49 Iowa, 639; Cone v. Cone, 58 N. H. 152.

## CHAPTER XXVII.

## DESERTION AS A CAUSE FOR DIVORCE.

§303. Desertion.
§304. What Constitutes Desertion.
§305. Must Continue for Statutory Period.
§306. When Desertion Justifiable.
§307. Separation not always Desertion.
§308. Constructive Desertion.
§309. Separation by Mutual Consent.
§310. Where Both Dwell in Same House.
§311. Refusal to Cohabit.
§312. Condonation of Desertion.
§313. Refusal to Follow Husband.
§314. Desertion not Excused by Continuing Support.
§315. Refusal of Sexual Intercourse.

### §303. Desertion.

In most of the states desertion or abandonment for a period varying from one to five years is generally prescribed by statute as a ground for divorce, either absolute or limited. The Michigan statute provides that a decree of absolute divorce may be decreed "when either party shall desert the other for a period of two years."[1]

### §304. What Constitutes Desertion.

Desertion or abandonment, within the meaning of divorce statutes, is the voluntary separation of one spouse from the other, for the period of time prescribed by the statute, without the consent, connivance or procurement of the latter, without justification, and with intention of not returning.[2]

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1. C. L. 1915, (11397); Howell, 2nd. Ed., §11458.

2. Rose v. Rose, 50 Mich. 92, 14 N. W. 711; Porritt v. Porritt, 18 Mich. 420; Cooper v. Cooper, 17 Mich. 205; Cox v. Cox, 35 Mich. 461; Morrison v. Morrison, 20 Cal. 431; Stein v. Stein, 5 Colo. 55; Bennett v. Bennett, 43 Conn. 313; Elzas v. Elzas, 171 Ill. 632, 49 N. E. 717; Orr v. Orr, 8 Bush. (Ky.) 156; Lynch v. Lynch, 33 Md. 328; Magrath v. Magrath, 103 Mass. 577, 4 Am. R. 579; Hall v. Hall, 77 Mo. App. 600; Davis v. Davis, 60 Mo. App. 545; Kikel v. Kikel, 25 Neb. 256, 41 N. W. 180; Davis v. Davis, 37 N. H. 191; Sergent v. Sergent, 33 N. J. Eq. 204; Williams v.

Some of the states describe the offense as "wilful and obstinate desertion." Where it is so described it is essential that the party complained of left voluntarily and against the will of the complainant, and that he or she remained away when duty required a return.[3]

## §305. Must Continue for Statutory Period.

The separation contemplated by the statute as constituting the offense of desertion, for which a decree of absolute divorce may be granted, should be continuous for the statutory period, by a voluntary breaking off of matrimonial relations and cohabitation by one party against the will of the other, under circumstances which the law does not consider sufficient to justify it.[4] The desertion must continue uninterruptedly for the period of two full years, and up to the time of filing the bill of complaint;[5] but it need not have continued two years in this state.[6]

## §306. When Desertion Justifiable.

Desertion of one of the parties by the other may be justifiable. Thus, a wife was held justified in living apart from her husband pending her trial on a charge brought by him against her of attempt to poison him, and also pending an application made by her in good faith for a divorce from him.[7] Where, after living peaceably for thirty-five years, a wife left her home against the will of her husband to visit a married daughter in a distant state, and the husband never wrote to her or asked her to return, or in anyway tried to induce her to do so, he was refused a decree of divorce on the ground of desertion, although the separation had continued for more than the statutory period.[8]

Where a husband permitted his wife to engage in business in another locality, without making any effort to have her

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Williams, 130 N. Y. 193, 29 N. E. 98, 27 Am. St. R. 517, 14 L. R. A. 220; Ogilvie v. Ogilvie, 37 Ore. 171, 61 Pac. 820; Besch v. Besch, 27 Tex. 390; Latham v. Latham, 30 Gratt. (Va.) 307; Martin v. Martin, 33 W. Va. 695, 11 S. E. 12; Warner v. Warner, 54 Mich. 494, 20 N. W. 557.

[3] Wood v. Wood, 63 N. J. Eq. 688, 53 Atl. 51; Sweeney v. Sweeney, 62 N. J. Eq. 357, 50 Atl. 785.

[4] Porritt v. Porritt, 18 Mich. 420.

[5] Rudd v. Rudd, 33 Mich. 101.

[6] Colburn v. Colburn, 70 Mich. 647, 38 N. W. 607.

[7] Porritt v. Porritt, 18 Mich. 420.

[8] Wright v. Wright, 80 Mich. 572, 45 N. W. 365.

remain with him, or to induce her to return, but on the contrary showed himself to be rather glad that she had gone, it was held that he was not entitled to a decree of divorce, although the separation continued uninterruptedly for more than two years.[9]

A wife who leaves her husband because of his cruelty to her, which she in good faith believes makes further residence with him unsafe, is not chargeable with desertion, but he is.[10]

### §307. Separation not always Desertion.

The separation of married persons differs from desertion of one by the other. Desertion is the wilful and voluntary abandonment of one of the parties by the other, for the statutory period, without cause and against the wish of the one abandoned; and where separation and desertion occur at the same time it is not always the one who leaves the matrimonial home who is the guilty party. If a husband's conduct toward his wife is so cruel that she cannot live and cohabit with him with safety to her health and without danger of bodily injury or if she has good reason to believe she cannot, and in good faith does believe so, and for such reason leaves him and abandons his home, she does not thereby become guilty of desertion such as will authorize a decree of divorce against her.[11]

### §308. Constructive Desertion.

The husband or wife who leaves the home is not in all cases the deserter. If a legal cause for leaving the home exists, for which the party remaining is responsible, the latter is constructively the deserter, as where the husband, by cruel and inhuman treatment which makes it unsafe for her to remain, compels his wife to leave the home; or where, being away from home with the husband's knowledge and consent, the wife is refused admittance by the husband when she returns.[12] So, the wife may be guilty of such misconduct toward the husband as to justify him in leaving her, and if the necessity for his doing so is without his fault and against his will the wife is the deserter.[13]

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[9] Beller v. Beller, 50 Mich. 49, 14 N. W. 696.

[10] Warner v. Warner, 54 Mich. 492, 20 N. W. 557.

[11] Warner v. Warner, 54 Mich. 494, 20 N. W. 557.

[12] Levering v. Levering, 16 Md. 213; Palmer v. Palmer, 22 N. J. Eq. 88; Gray v. Gray, 15 Ala. 779; Porrit v. Porrit, 18 Mich. 420; Warner v. Warner, 54 Mich. 492, 20 N. W. 557.

But the conduct of one party, to justify the other in abandoning the home, must be of such a nature as to be inconsistent with the marital relation, and must be such as to render cohabitation unsafe.[14]

Departure or absence of one of the parties from the family dwelling place, caused by cruelty or by threats of bodily harm frou which danger would reasonably be appreheneded form the other, is not desertion by the absent party, but is desertion by the other party.[15]

### §309. Separation by Mutual Consent.

A separation by mutual agreement or consent of the parties cannot be construed as desertion by either, unless one of the parties in good faith offers to resume cohabitation, and such offer is refused without just cause."[16]

### §310. Where Both Dwell in Same House.

The courts, under some circumstances, have granted decrees of divorce where both parties continued to dwell under the same roof, but as a rule it is held that there must be an actual or constructive desertion of the home.[17]

### §311. Refusal to Cohabit.

Where a marriage is performed in compliance with the statutory requirements, and its purpose is to prevent a conviction of bastardy and to legitimize a child of the parties, and it is agreed between the parties that the marriage shall not be consummated by cohabitation, and that agreement is observed, neither can obtain a decree on the grounds of desertion. The marriage in such case is nevertheless valid, and neither party can obtain a divorce from the other on the ground of adultery.

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[13] Gray v. Gray, 15 Ala. 779.

[14] Kinsey v. Kinsey, 37 Ala. 393; Harding v. Harding, 22 Md. 337; Levering v. Levering, 16 Md. 213; Fera v. Fera, 98 Mass. 155; Cornish v. Cornish, 23 N. J. Eq. 208; Sower's App., 89 Pa. St. 173.

[15] Pollock v. Pollock, 9 S. D. 48, 68 N. W. 176.

[16] Cooper v. Cooper, 17 Mich. 205, 97 Am. Dec. 182; Crow v. Crow, 23 Ala. 583; Gray v. Gray, 15 Ala. 779; Lynch v. Lynch, 33 Md. 328; Simpson v. Simpson, 31 Mo. 24; Goldbeck v. Goldbeck, 18 N. J. Eq. 42; Ingersoll v. Ingersoll, 49 Pa. St. 249; Power v. Power, 65 N. J. Eq. 93, 55, Atl. 111.

[17] Evans v. Evans, 93 Ky. 510, 20 S. W. 605; Anshutz v. Anshutz, 16 N. J. Eq. 162.

A wife is guilty of desertion where she refuses to occupy the husband's bed, and leaves home the morning after the marriage without just cause and against his will.[19]

The consummation of a marriage by coition is not necessary to its validity. The status of the parties is fixed by law when the contract is entered into in the manner prescribed by the statutes in relation to the solemnization of marriages.[20] Hence where a man marries a woman to avoid a prosecution for bastardy, and immediately leaves her, never cohabiting with her, she may obtain a divorce for desertion, although the marriage was not consummated by coition.[21] And a wife who refuses to remove to her husband's home, or to cohabit with him in her home, is guilty of desertion.[22]

### §312. Condonation of Desertion.

Desertion, such as will in all cases be a valid cause for divorce, is not easily defined. And it may be said to be equally difficult to define what will amount to an interruption or condonation of desertion which will preclude the granting of a divorce.[23] Where the parties have consented to live apart, either party may revoke such consent at any time, and if one of them does so, and honestly seeks in good faith to renew cohabitation and the other refuses, such refusal constitutes desertion.[24] A visit by the hsuband to the wife during the period of her desertion, with a view of inducing her to return, and an attempt to do so, even although they occupy the same room and bed during such visit, will not interrupt the period of desertion necessary to entitle the husband to a divorce, nor will it condone her offense of desertion if she refuses to return. But if under such circumstances the husband succeeds in inducing her to return and she does return to her home and matrimonial duties, undoubtedly the desertion would be regarded as condoned and at an end.

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[18] Franklin v. Franklin, 154 Mass. 515, 28 N. E. 618, 26 Am. St. R. 266, 13 L. R. A. 843.

[19] Pilgrim v. Pilgrim, 57 Iowa 370, 10 N. W. 750.

[20] Franklin v. Franklin, 154 Mass. 515, 13 L. R. A. 843; Eaton v. Eaton, 122 Mass. 276; Jackson v. Winnie, 7 Wend. 47.

[21] McQuaid v. McQuaid, Wright (Ohio) 223.

[22] Sisemore v. Sisemore, 17 Ore. 542, 21 Pac. 820.

[23] Stewart v. Stewart, 78 Me. 548, 57 Am. R. 822; Danforth v. Danforth, 88 Me. 120, 51 Am. St. R. 380, 31 L. R. A. 608.

[24] Danforth v. Danforth, 88 Me. 120.

## §313. Refusal to Follow Husband.

The general rule is that the husband has the legal right to select and fix the family home and place of domicile, as he is considered the head and support of the family. If he removes to another state or locality, and there provides a reasonable home, suitable to their station in life, and the wife, without reasonable cause, refuses to follow or go with him, without legal cause, she is guilty of such desertion as will entitle him to a divorce, after such refusal has continued for the statutory period.[25]

## §314. Desertion not Excused by Continuing Support.

Where a husband intentionally and against his wife's consent has abandoned all matrimonial intercourse and companionship with her for the statutory period, and denied her the protection of his home, she is entitled to a decree of divorce, even although during such period he has regularly contributed money, and from time to time necessaries, toward supporting the wife and their children.[26]

## §315. Refusal of Sexual Intercourse.

In some of the states the refusal of sexual intercourse is considered as constituting desertion where there is no just or reasonable cause for such refusal.[27] In other states it has been held that such refusal does not constitute such desertion as will authorize a decree of divorce on that ground alone.[28]

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[25] Kennedy v. Kennedy, 87 Ill. 250; Babbitt v. Babbitt, 69 Ill. 277; Walker v. Leighton, 31 N. H. 111; Hunt v. Hunt, 20 N. J. Eq. 96; Hair v. Hair, 10 Rich. Eq. (S. C.) 163.

[26] Magrath v. Magrath, 108 Mass. 577, 4 Am. R. 579; Sargent v. Sargent, 36 N. J. Eq. 644; Ralstan's Appeal, 93 Pa. St. 133.

[27] Whitfield v. Whitfield, 89 Ga. 471, 15 S. E. 543.

[28] Stewart v. Stewart, 78 Me. 548, 57 Am. R. 822; Cowles v. Cowles, 112 Mass. 298; Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; Schoesson v. Schoesson, 83 Wis. 553, 53 N. W. 856.

## CHAPTER XXVIII.

## HABITUAL DRUNKENNESS AS A CAUSE FOR DIVORCE.

§316. Habitual Drunkenness.
§317. Definition.
§318. Constant and Continuous Drunkenness.
§319. Use of Opiates.
§320. Period of Indulgence.
§321. Antenuptial Habit.
§322. Condonation.

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### §316. Habitual Drunkenness.

The Michigan statute, as well as the statutes of many other states, provides that a divorce from the bonds of matrimony may be decreed when the husband or wife shall have become an habitual drunkard.[1]

In many of the states, the term used in the statute is "habitual intemperance" for a certain period; in others the term used in the statute is "habitual drunkenness," and in still others the cause for divorce is expressed as "habitual drunkenness" or "habitual intemperance" of the husband.[2]

### §317. Definition.

A precise definition of the term habitual drunkard, which will cover all cases which come before the courts, is somewhat difficult to frame. The language of the Michigan statute is: "When the husband or wife has become an habitual drunkard." One who has the drink habit so firmly fixed upon him that he gets drunk as often as he goes where liquor is sold, is unquestionably an habitual drunkard within the meaning of the statute.

While habitual drunkenness or intemperance caused by the voluntary and excessive use of alcoholic liquors is a ground for divorce in nearly all the states, it is generally held that a divorce will not be granted on the ground of drunkenness or intemperance unless it is shown that such drunkenness or intemperance is habitual.[3] It is generally held that the persistent habit of becoming grossly intoxicated constitutes the offense of habitual drunkenness within the meaning of the divorce laws of the several states where that offense is made ground for divorce.[4]

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[1] C. L. 1915, (11397); Howell, 2nd. Ed., §11458, Sub. 5.

[2] See Part 3, Chapter XXII.

## §318. Constant and Continuous Drunkenness.

It is not necessary to show constant and continuous drunkenness to make out the offense within the meaning of the statute.[5] Nor is occasional indulgence in intoxicating liquors sufficient to establish a charge of habitual drunkenness or habitual intemperance.[6] It is not necessary that the habit shall render the party at all times incapable of attending to business, but it is sufficient if it disqualifies him from attending to his business during the principal portion of the time usually devoted to business.[7]

## §319. Use of Opiates.

The intoxication or drunkenness meant by the statute, unless otherwise expressed, is that produced by the excessive use of alcoholic liquors, and not by excessive use of opiates.[8] In some of the states, however, gross and confirmed drunkenness, caused by the voluntary and excessive use of opium or other drugs, is a ground for divorce.[9]

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[3] Magahay v. Magahay, 35 Mich. 210; Brown v. Brown, 38 Ark. 324; McGill v. McGill, 19 Fla. 341; Batchelder v. Batchelder, 14 N. H. 380; Myrick v. Myrick, 67 Ga. 771.

[4] McGill v. McGill, 14 Fla. 341; Myrick v. Myrick, 67 Ga. 771; Youngs v. Youngs, 13 Ill. 230, 22 N. E. 806, 17 Am. St. R. 313, 6 L. R. A. 548; Richards v. Richards, 19 Ill. App. 465; Walton v. Walton, 34 Kan. 195, 8 Pac. 110; Williams v. Goss, 43 La. Am. 868, 9 So. 750; Blaney v. Blaney, 126 Mass. 205; Magahay v. Magahay, 35 Mich. 210; Golding v. Golding, 6 Mo. App. 602; McBee v. McBee, 22 Ore. 329, 29 Pac. 887, 29 Am. St. 613; Gourley v. Gourley, 16 R. I. 705, 19 Atl. 142.

[5] Fuller v. Fuller, 108 Ga. 256, 33 S. E. 865; Meathe v. Meathe, 83 Mich. 150, 47 N. W. 109; Ishler v. Ishler, 81 Mo. App. 567.

[6] Myrick v. Myrick, 67 Ga. 771; Bizer v. Bizer, 110 Iowa 248, 81 N. W. 465; Meathe v. Meathe, 83 Mich. 150, 47 N. W. 109; McBee v. McBee, 22 Ore. 329, 29 Pac. 887, 29 Am. St. R. 613, holding that where the defendant drank to excess only when he went to town from his farm, which did not average more than twice a month, and he was never disqualified from doing his work, it was not habitual gross drunkenness.

[7] Mahone v. Mahone, 19 Cal. 626, 81 Am. Dec. 91.

[8] Youngs v. Youngs, 130 Ill. 230, 22 N. E. 806, 17 Am. St. R. 313, 6 L. R. A. 548; Dawson v. Dawson, 23 Mo. App. 169.

### §320. Period of Indulgence.

In many of the states the statute prescribes the period during which the habit must continue in order to make it a ground for divorce. Where the statute so provides, it must be shown that the habit has continued up to the time of filing the bill of complaint.[10]

### §321. Antenuptial Habit.

Where the habit was contracted before the marriage, and existed at the time of the marriage, it is not ordinarily a ground for divorce.[11] And in all cases where the plaintiff had knowledge of the obnoxious habit prior to the marriage, and entered into the marriage with full knowledge that it still existed, such knowledge will be a bar to a suit for divorce.[12]

### §322. Condonation.

The matrimonial offense of habitual drunkenness may be condoned the same as any other ground of divorce. What will amount to a condonation, however, must depend upon the particular circumstances of each case. In general, condonation within the meaning of divorce laws may be said to be forgiveness of an antecedent matrimonial offense, which otherwise would be ground for divorce, on condition that it shall not be repeated, and that the offender shall thereafter treat the injured party with conjugal kindness.[13]

Where the offense has once been condoned there can be no divorce so long as the offender complies with the condition, but a repetition of the offense, after forgiveness, works a revival of the original ground for divorce.[14]

The subject of condonation will be further considered under the title of actions for divorce.

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[9] Burt v. Burt, 168 Mass. 204, 46 N. E. 622.

[10] Reynolds v. Reynolds, 44 Minn. 132, 46 N. W. 236; Burt v. Burt, 168 Mass. 204, 46 N. E. 622.

[11] Lyster v. Lyster, 111 Mass. 327; Porritt v. Porritt, 16 Mich. 140.

[12] Stanley v. Stanley, 115 Ga. 990, 42 S. E. 374; Heinzman v. Heinzman, 15 Pa. Co. Court, 669; Tilton v. Tilton, 29 S. W. 290; Smith v. Smith, 53 S. W. 1000.

[13] Turnbull v. Turnbull, 23 Ark. 615; Sharp v. Sharp, 116 Ill. 509, 6 N. E. 15.

[14] Odom v. Odom, 36 Ga. 285; Farnham v. Farnham, 37 Ill. 497.

# CHAPTER XXIX.

## FOREIGN DIVORCES.

§323. Divorce Obtained in Another State.
§324. Foreign Divorce.
§325. Jurisdiction—Residence of Parties.
§326. Jurisdiction Continued—Conflict of Laws.

### §323. Divorce Obtained in Another State.

In Michigan the courts may in their discretion grant a divorce from the bonds of matrimony to any party who is a resident of the state, whose husband or wife shall have obtained a divorce in any other state.[1]

### §324. Foreign Divorce.

A decree of divorce obtained by one party in another state against the other party residing in this state, furnishes a ground for divorce to the latter, whether the decree in the other state is valid, void or voidable.[2]

Where a defendant filed a cross bill alleging a prior divorce from plaintiff procured by him in another state, it was held that such foreign divorce could not be pleaded as a bar to the action, since such divorce itself constitutes a ground of divorce to a plaintiff residing in this state.[3]

### §325. Jurisdiction—Residence of Parties.

The complainant must have been domiciled in this state, in good faith, for the statutory period before commencing the action, and a wife may acquire such a domicile, separate from that of her husband.

It appears to be the general rule, that to give the courts of any state jurisdiction over the marriage relation between husband and wife, one of the parties, at least, must have a domicile within that state. Some of the statutes and judicial decisions make further requirements, but no court has held that any less could be demanded.[4]

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[1] C. L. 1915, (11397); Sub. 6; Howell, 2nd. Ed. §11458.

[2] Wright v. Wright, 24 Mich. 180.

[3] Van Inwagen v. Van Inwagen, 86 Mich. 333, 49 N. W. 154.

The provision of the Federal constitution which requires full faith and credit to be given in every state to the records and judicial proceedings of the other states does not extend to the giving of validity to proceedings which are, in themselves, mere nullities. It is implied in judicial proceedings that the court assuming to act and to render judgment should have had competent authority to do so in the particular case; and, when this authority is wanting, whatever is done is not judicial.[5]

And even where the record, by its recitals, makes a *prima facie* case of jurisdiction, no one in another state or country is precluded thereby, but he may show what the real fact was, and thus disprove the authority for making such a record.[6]

### §326. Jurisdiction Continued—Conflict of Laws.

Courts of chancery in Michigan have no jurisdiction in divorce proceedings beyond what has been conferred by statute. Where, on granting to the wife a divorce in another state, children are taken from the parental control of the father, and their care and custody given to the mother, she cannot maintain an action in this state, by proceedings supplemental to the decree obtained in a foreign state, to compel the father to support the children, for the reason that the statute of this state gives its courts no such authority.[7]

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[4] People v. Dawell, 25 Mich. 254, in which it is also held that the recitals in the record of a divorce case, that the parties are residents of the state where the suit is instituted, do not preclude the showing, in another state, where the divorce comes collaterally in question, that the parties never resided in said first mentioned state, and that the suit was fraudulent and collusive.

[5] Reed v. Reed, 52 Mich. 117, 17 N. W. 720.

[6] Thompson v. Whitman, 18 Wall. (U. S.) 457, 21 L. Ed. 897; Knowles v. Gas Light Co., 19 Wall. 58, 22 L. Ed. 70; Bartlett v. Knight, 1 Mass. 401, 2 Am. Dec. 36; Shumway v. Stillman, 4 Conn. 292, 15 Am. Dec. 374; Thompson v. Emmert, 15 Ill. 416; Marx v. Fore, 51 Mo. 69, 11 Am. R. 432; Reel v. Elder, 62 Pa. St. 308, 1 Am. R. 414; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. R. 340; Gilman v. Gilman, 126 Mass. 26, 30 Am. R. 646; Bowler v. Hurton, 32 Am. R. 673; Eaton v. Hasty, 6 Neb. 419, 29 Am. R. 365; People v. Dawell, 25 Mich. 247, 12 Am. R. 260; Reed v. Reed, 52 Mich. 117, 17 N. W. 720; Bear v. Heasley, 98 Mich. 279, 315, 57 N. W. 270; Wright v. Wright, 24 Mich. 180; McEwan v. Zimmer, 38 Mich. 765.

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[7] Judson v. Judson, 171 Mich. 185, 137 N. W. 103; Peltier v. Peltier, Har. Ch. 19; Perkins v. Perkins, 16 Mich. 167; Wright v. Wright, 24 Mich. 180, Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340; Baugh v. Baugh, 37 Mich. 61; Haines v. Haines, 35 Mich. 145.

## CHAPTER XXX.

## DIVORCE FROM BED AND BOARD.

§327. When may be Decreed.
§328. When Absolute Divorce Granted.
§329. Purpose of the Statute.
§330. Effect of the Amendment.
§331. Extreme Cruelty.
§332. Evidence to Establish Extreme Cruelty.
§333. Acts Constituting Extreme Cruelty.
§334. Acts not Extreme Cruelty.
§335. Condonation of Extreme Cruelty.
§335a. Refusal of the Husband to Support the Wife.

### §327. When may be Decreed.

The statute of Michigan provides that "a divorce from bed and board forever, or for a limited time, may be decreed for the ground of extreme cruelty, whether practiced by using personal violence or by any other means; or for utter desertion by either of the parties for the term of two years; and a like divorce may be decreed on the complaint of the wife, when the husband, being of sufficient ability to provide a suitable maintenance for her, shall grossly or wantonly and cruelly refuse or neglect to do so."[1]

It will be noticed that this section authorizes divorce from bed and board, or limited divorce, for three specified causes, one of which, desertion, is made ground for absolute divorce by the preceding section.[2]

### §328. When Absolute Divorce Granted.

The same statute also provides that "a divorce from the bonds of matrimony may be decreed for either of the causes mentioned in the preceding section whenever, in the opinion of the court, the circumstances of the case shall be such that it will be discreet and proper so to do; but no divorce from the bonds of matrimony for either of the causes mentioned in the preceding section shall be entered in any case where the same is not asked for by the complainant in the bill of complaint filed therein or by the defendant on a cross-bill, unless the court hearing the evidence shall deem it for the best interest of the parties to grant a divorce from the bonds of matrimony, and in that event the court may grant such divorce."[3]

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[1] C. L. 1915, (11398); Howell, 2nd. Ed., §11459.

[2] C. L. 1915, (11397); Sub. 4; Howell, 2nd. Ed., §11458.

### §329. Purpose of the Statute.

This statute, authorizing the courts to grant a decree of absolute divorce for any of the causes mentioned in the preceding section whenever in the opinion of the court it will be discreet and proper to do so, provides for such decree, not to meet the desire of the parties, but on grounds of public policy, to prevent the mischiefs arising from turning out into the world, in enforced celibacy, persons who are neither married nor unmarried.[4] And in such a case it has been ruled that the court may decree an absolute divorce, although the complainant asks for a decree of separation only.[5]

Since the decision announcing the foregoing rules, the legislature has amended Section 8622 of the Compiled Laws of 1897, by adding thereto the following:—"But no divorce from the bonds of matrimony for either of the causes mentioned in the preceding section shall be entered in any case where the same is not asked for in the bill of complaint filed therein, or by the defendant on a cross-bill, unless the court hearing the evidence shall deem it for the best interest of the parties to grant a divorce from the bonds of matrimony, and in that event the court may grant such divorce."[6]

This amendment was ordered to take immediate effect, and was approved by the governor on June 28, 1907.

### §330. Effect of the Amendment.

This amendment, while it prohibits the courts from granting decrees of absolute divorce for the causes mentioned, unless the same is asked for in the complainant's bill or by a cross-bill of the defendant, still authorizes such decree "where the court hearing the evidence shall deem it for the best interest of the parties to grant a divorce from the bonds of matrimony."

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[3] C. L. 1915, (11399); Howell, 2nd. Ed., §11460.

[4] Burlage v. Burlage, 65 Mich. 624, 32 N. W. 866.

[5] Sullivan v. Sullivan, 112 Mich. 674, 71 N. W. 487, Moore J. dissenting.

[6] P. A. 1907, No. 324; Howell, 2nd. Ed., §11460; C. L. 1915, (11399).

It seems still to leave a certain discretion with the court relative to granting an absolute divorce, when not asked for by either party, but requires that discretion to be exercised with a view to the best interests of the parties, instead of on considerations of public policy, regardless of the desires of the parties to the action. It does not deprive either the circuit court or the Supreme Court of the discretion to grant an absolute divorce on the grounds mentioned, even where neither of the parties ask for such decree, and desire only a limited divorce. The form of decree which should be made in such cases still rests in the sound discretion of the circuit court in the first instance, and, upon appeal, in the sound discretion of the Supreme Court.[7] And we think it may safely be said that it is still the settled policy of the courts of this state to grant decrees of absolute divorce, where the complainant asks for a limited divorce only, if the circumstances of the case are such that public policy or the interests of the parties and the public will be better protected than by a limited divorce.[8]

## §331. Extreme Cruelty.

Extreme cruelty as a ground for divorce may embrace a good many different acts, and the term is somewhat elastic. What may amount to such cruelty as would constitute good cause for a divorce in one case may be entirely insufficient in another. Those acts, or that conduct and language, which in some conditions of life would pass as ordinary incidents of the marriage relation, might constitute in other social phases the very refinement of cruelty.[9]

It is not essential that the misconduct charged as extreme cruelty should be of a criminal character, or such as the guilty party can be prosecuted for in the criminal courts, but it is sufficient if the acts are such as are calculated to destroy the plaintiff's happiness, and have that effect.[10] When alleged as a cause for divorce, it must be shown to be of such an aggravating character as to subvert the family relations by rendering the association intolerable.[11]

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[7] Horning v. Horning, 162 Mich. 130, 127 N. W. 275; Coon v. Coon, 163 Mich. 644, 129 N. W. 12.

[8] Burlage v. Burlage, 65 Mich. 624, 32 N. W. 866; Sullivan v. Sullivan, 112 Mich. 674, 71 N. W. 487; Utley v. Utley, 155 Mich. 258, 118 N. W. 932; Horning v. Horning, 162 Mich. 130, 127 N. W. 275; Coon v. Coon, 163 Mich. 644, 129 N. W. 12.

[9] Hall v. Hall, 172 Mich. 210, 137 N. W. 536.

[10] Bearinger v. Bearinger, 170 Mich. 661, 136 N. W. 1117.

## §332. Evidence to Establish Extreme Cruelty.

The evidence to establish extreme cruelty, sufficient to authorize a decree of divorce for that cause, must relate to the specific acts charged in the bill of complaint. A decree of divorce cannot be sustained on the ground of extreme cruelty upon evidence of acts or conduct not set up in the bill. And if the bill alleges extreme cruelty in general terms only, without setting up any particular acts or conduct, no proof of cruelty can be introduced.[12]

But where the specific acts of cruelty relied upon are sufficiently set forth in the bill, the evidence is not necessarily confined to those acts, but whatever will serve to explain or give character to them may be shown. Acts of personal violence even, when intrinsically and separately considered, may not amount to such a degree of cruelty as to justify a divorce, yet when attended by such habitual cruel behavior as to amount to an outrage upon the sense of decency and propriety of the one affected by it, a case of extreme cruelty is made out.[13]

## §333. Acts Constituting Extreme Cruelty.

A long and continuous course of conduct by one of the parties toward the other, without the fault of the other, which results in making the matrimonial relation unendurable and in driving the latter from the home of the offender, is such extreme cruelty as the statute contemplates as just ground for a divorce from bed and board, and, in the discretion of the court, for an absolute divorce.[14]

So the persistent circulation of false and slanderous reports by a husband, derogatory to his wife's chastity, especially when the wife is of a refined and sensitive nature, will authorize a decree of divorce, either limited or absolute.[15]

The persistent, wilful, and habitual conduct of a wife toward her husband in an offensive and opprobrious manner, accusing him in public and private of infamous conduct in violation of his marriage duties, and calling him vile and vulgar names, may amount to such extreme cruelty as will justify a divorce.[16]

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[11] Cooper v. Cooper, 17 Mich. 210; Chaffee v. Chaffee, 15 Mich. 184.

[12] Bennett v. Bennett, 24 Mich. 482; Dashback v. Dashback, 62 Mich. 322, 28 N. W. 812.

[13] Briggs v. Briggs, 20 Mich. 34.

[14] Briggs v. Briggs, 20 Mich. 45, 46.

[15] Goodman v. Goodman, 26 Mich. 417.

Consorting with persons of loose morals, or lascivious inclinations toward the opposite sex, and showing or expressing a preference for them, may be such extreme cruelty toward the injured spouse as will justify a decree of divorce.[17]

The communication of a venereal disease[18] is extreme cruelty, and will justify a decree of divorce, either limited or absolute; but the fact that a wife of unimpeached character is found to have such a disease is not of itself sufficient evidence that it was communicated to her by her husband.[19]

Among other acts constituting extreme cruelty within the meaning of the statute may be enumerated personal violence;[20] abusive epithets and blows;[21] violence and threats of injury;[22] fault finding, nagging, profanity, abuse and violent conduct;[23] compelling a wife to submit to an abortion;[24] abusive epithets applied by the wife, and refusal to prepare meals; [25] unreasonably and persistently prejudicing children against their mother;[26] unreasonable refusal of intercourse by the wife;[27] persistently addressing the wife in brutal language,[28] accusing her of adultery, perjury and fraud;[29] profane, obscene and insulting language, habitually indulged in towards a wife of refined feelings and sensitive nature;[30] accusations against the wife of immoral or unchaste conduct;[31] calling vile names and persistently and without cause charging dishonesty and infidelity;[32] wife calling husband opprobrious names, accusations of immorality, and unreasonable refusal of cohabitation.[33]

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[16] Whitmore v. Whitmore, 49 Mich. 417, 13 N. W. R. 769.

[17] McClung v. McClung, 40 Mich. 493.

[18] Canfield v. Canfield, 34 Mich. 519; Holthoefer v. Holthoefer, 47 Mich. 260, 11 N. W. 150.

[19] Holthoefer v. Holthoefer, 47 Mich. 260, 11 N. W. R. 150.

[20] Austin v. Austin, 172 Mich. 620, 138 N. W. 215.

[21] Murray v. Murray, 169 Mich. 388, 135 N. W. 262.

[22] Utley v. Utley, 155 Mich. 258, 118 N. W. 932.

[23] Jarstfer v. Jarstfer, 162 Mich. 196, 127 N. W. 24.

[24] Dunn v. Dunn, 150 Mich. 476, 114 N. W. 385.

[25] Begrow v. Begrow, 162 Mich. 349, 127 N. W. 256.

[26] McDuffee v. McDuffee, 169 Mich. 410, 135 N. W. 242.

[27] Case v. Case, 159 Mich. 491, 122 N. W. 538.

[28] Hoyt v. Hoyt, 56 Mich. 50 22 N. W. 105.

[29] Walsh v. Walsh, 61 Mich. 554, 28 N. W. 718.

[30] Bennett v. Bennett, 24 Mich. 484-485; Palmer v. Palmer, 45 Mich. 150, 7 N. W. 760.

[31] Kraft v. Kraft, 160 Mich. 654, 125 N. W. 693.

While the acts and conduct mentioned in this section have been adjudicated to be such extreme cruelty as will justify a decree of divorce under the circumstances as shown, it should be borne in mind that as a general rule each case must be governed by its own peculiar circumstances. It may be stated, however, that if such conduct, whether by the husband or wife, is without cause or excuse, and is persisted in until it becomes unbearable and unendurable by the innocent party, a decree of divorce should be granted; and in the more extreme cases an absolute divorce, it is believed, would be better and more conducive to good morals than a decree of separation. Neither considerations of morality nor of public policy should compel a faithful wife to be bound for life to a brutal, drunken husband, nor a kind and indulgent husband to be forced to submit to the baseless accusations of crime and immorality of a wife who constantly and persistently violates her marriage vow.

## §334. Acts not Extreme Cruelty.

It is not every act of unkindness, nor every act of selfishness or temper, that will constitute extreme cruelty within the contemplation of the statute. It has been held that the following acts do not constitute such extreme cruelty as will justify a decree of divorce: Quarreling, and a single act of violence;[34] petty annoyances and fault-finding;[35] unhappiness arising from unruly tempers and mutual wrangling;[36] irascibility and harshness when provoked purposely;[36a] a single act of causeless violence; [37] mutual wrangling and exhibitions of unruly temper.[38] A husband will not be heard to complain of cruelty by his wife when he is at the same time denying to her all consideration due to her as such.[39] Incompatibility of temper and mutual quarreling constitute no ground for divorce.[40]

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[32] Delor v. Delor, 159 Mich. 624, 124 N. W. 544.

[33] Waldhorn v. Waldhorn, 165 Mich. 130, 130 N. W. 199.

[34] Root v. Root, 164 Mich. 638, 130 N. W. 194.

[35] Johnson v. Johnson, 49 Mich. 639, 14 N. W. 670.

[36] Rose v. Rose, 50 Mich. 92, 14 N. W. 711.

[37] German v. German, 57 Mich. 256, 23 N. W. 802.

[38] Cooper v. Cooper, 17 Mich. 210; Johnson v. Johnson, 49 Mich. 639, 14 N. W. 670.

### §335. Condonation of Extreme Cruelty.

The offense of extreme cruelty may be condoned the same as any other cause for divorce. If the injured party seeks a reconciliation, and marital relations are resumed unconditionally, ordinarily the act of cruelty is condoned.[41]

But continuance of the marriage relation after one of the parties has been guilty of extreme cruelty, sufficient to justify a decree of divorce, does not furnish a defense on the ground of condonation, unless the offense is not repeated, and unless proper subsequent treatment is shown.[42] Condonation of an offense exists only upon condition that it shall not be repeated, and also that afterwards the party whose offense is forgiven shall treat the other with conjugal kindness; and a breach of such condition will revive the original right to a divorce.[43]

The fact that after being cruelly treated, to the extent that she has good ground for divorce, a wife continues to live with her husband for several years in the hope of receiving proper treatment, in which she is disappointed, will not constitute such condonation of the original cruelty as will preclude her from relying on it in her suit for divorce.[44]

But while condonation is conditional upon an express or implied promise that the offense forgiven shall not be repeated, and that the party forgiven shall treat the other thereafter with conjugal kindness, it is not be treated as a matter of strict contract. It is more properly a question of whether the facts warrant the conclusion that there was forgiveness, reconciliation, reunion and restoration of all marital rights.[45]

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[39] Holmes v. Holmes, 44 Mich. 555, 7 N. W. 228.

[40] Root v. Root, 164 Mich. 638, 130 N. W. 194; Morrison v. Morrison, 64 Mich. 53, 30 N. W. 903.

[41] Runkle v. Runkle, 96 Mich. 493, 56 N. W. 2; Tackaberry v. Tackaberry, 101 Mich. 102, 59 N. W. 400.

[42] Hazelton v. Hazelton, 162 Mich. 192, 127 N. W. 297.

[43] 2 Bishop on Marriage and Divorce, Sec. 308-9; Creech v. Creech, 126 Mich. 267, 85 N. W. 726.

[44] Creyts v. Creyts, 133 Mich. 4, 94 N. W. 383.

[45] Creech v. Creech, 126 Mich 268, 85 N. W. 726; 2 Bishop, Mar. Div. & Sep., Sec. 271; 9 Am. and Eng. Enc. of Law (2nd Ed.) 822 and note.

### §335a. Refusal of the Husband to Support the Wife.

A divorce from bed and board forever, or for a limited time, may be decreed on the complaint of the wife, "when the husband, being of sufficient ability to provide a suitable maintenance for her, shall grossly or wantonly and cruelly refuse or neglect so to do."[46] The court may, in its discretion, grant an absolute divorce for the same cause, when asked for in the bill of complaint, if in the opinion of the court it will be discreet and proper so to do, under the particular circumstances of the case, if the court shall deem such absolute divorce for the best interest of the parties.[47]

The same statute also provides for a limited divorce or an absolute one, under similar conditions, for "utter desertion by either of the parties for the term of two years."

In a bill for limited divorce on the ground of the husband's refusal to support the wife, an allegation charging the husband with "inhuman and cruel treatment," and that "he had grossly, wantonly and cruelly refused and neglected to provide a suitable maintenance," states sufficient cause for a divorce, and, if such allegation is supported by the proof, will justify a decree of divorce from bed and board. In such a case it is not necessary to aver any cruel treatment, except what is involved in the gross, wanton and cruel neglect or refusal to support the wife, the defendant being of sufficient ability. Under such averments all those facts and circumstances tending to show that the neglect and refusal were gross, wanton and cruel, are admissible in evidence.[48]

Willingness of the husband to support the wife in his own home is no defense to her claim of right to be supported elsewhere, when his treatment of her is such as to render it unsafe and improper for her to reside and cohabit with him.[49] But an obligation of the husband to support the wife elsewhere than in his own home can arise only by his turning her away from such home, or by his being guilty of such misconduct as would justify her in leaving him.

If the conduct of a husband towards his wife is such that she cannot safely and properly live with him, and for that reason it becomes necessary for her to leave the home, she does not thereby relinquish her right to support from her husband. His obligation to support her remains the same, although by his own conduct he has relinquished his right to the wife's services, which constitute the consideration for his obligation to support her.[50]

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[46] C. L. 1915, (11398); Howell, 2nd. Ed., §11460.

[47] P. A. 1907, p. 426; Howell, 2nd. Ed., §11460.

[48] Brown v. Brown, 22 Mich. 242.

[49] Brown v. Brown, 22 Mich. 242; Randall v. Randall, 37 Mich. 574.

The failure of a husband to support his wife, which is due to lack of success in business, is not, ordinarily, ground for divorce. In all cases for divorce, either absolute or limited, on the ground of failure to support the wife, it must be made to appear that the husband is of sufficient ability, and that without any reason or cause whatever he neglects or refuses to furnish such support.

The wife's right is to be supported at her husband's domicile, unless she has lost that right by misbehavior.[51]

Where a wife who is seeking a divorce is justified by her husband's conduct in living apart from him, he is under legal obligation to support her elsewhere.[52]

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[50] Randall v. Randall, 37 Mich. 574; Stewart v. Stewart, 155 Mich. 421, 119 N. W. 444.

[51] Snyder v. People, 26 Mich. 109.

[52] Page v. Page, 51 Mich. 88, 16 N. W. 245.

# CHAPTER XXXI.

## GENERAL PROVISIONS IN ACTIONS FOR DIVORCE AND ANNULMENT OF MARRIAGE.

§336. Residence of Parties.
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## §336. Residence of Parties.

The Michigan statute provides that "no decree of divorce shall be granted by any court of this state in any case unless: *first*, the party applying therefor shall have resided in this state for one year immediately preceding the time of filing the bill or petition therefor; or *second*, the marriage which it is sought to dissolve was solemnized in this state, and the party applying for such divorce shall have resided in this state from the time of such marriage until the time of bringing such suit for divorce."

The statute further provides that no divorce shall be granted unless one of the following facts exists: *first*, when the defendant is domiciled in this state at the time the bill is filed; or *second*, when the defendant was domiciled in this state when the cause for divorce alleged in the bill arose; or *third*, when the defendant shall have been brought in by publication, or shall have been personally served with process in this state, or shall have been personally served with a copy of the order for appearance and publication within this state or elsewhere, or has voluntarily appeared in the action.

If the order for appearance and publication is served outside this state, proof of such service must be made by the affidavit of the person who serves the same, and such affidavit may be made before a justice of the peace or notary public.

If the affidavit is made outside the state, it must be authenticated by the certificate of the clerk of a court of record, certifying to the official character of the justice or notary, and the genuineness of his signature to the jurat of the affidavit.

In all cases where divorce is asked on the ground of desertion, such desertion is deemed to have occurred and taken place in this state, for the purpose of this act, when the parties, plaintiff and defendant, shall have been actually domiciled in good faith, in this state at the time the defendant actually abandoned the plaintiff, without the proof of his or her actual intent at the time of such abandonment.

When the bill charges that the cause or causes for divorce occurred out of this state, no decree of divorce can be granted unless the plaintiff or defendant, one or both of them, shall have resided in this state for two years immediately preceding the time of filing the bill.

No proofs or testimony can be taken in any action for divorce until the expiration of two months from the time of filing the bill, except where the cause for divorce alleged in the bill is desertion, or when testimony is taken conditionally for the purpose of perpetuating such testimony.

When the defendant in a divorce suit was not domiciled in this state at the time the suit was commenced, or shall not have been domiciled therein at the time the cause for divorce arose, before any decree of divorce can be granted the plaintiff must prove that the parties have actually lived and cohabited together as husband and wife within this state, or that the plaintiff has in good faith resided in this state for two years immediately preceding the time of filing the bill for divorce.[1]

The statutory provisions as to residence are mandatory, and the place of residence must be shown by intention and acts. An admission by the defendant's answer, of complainant's residence as alleged in the bill, is not sufficient to confer jurisdiction. Such residence must be proven as a fact, regardless of the admissions of the answer. Intention has always been given large consideration in determining the question of residence, but it is not controlling without acts to support it, and such acts should be such as fairly tend to show the intention.[2]

## §337. Oath of Plaintiff as to Collusion.

The statute positively forbids the granting of a decree of divorce when it appears that the bill therefor was founded in, or exhibited by, collusion between the parties. The oath or affirmation administered to the plaintiff in swearing to the bill, in addition to all other legal requirements, must recite the following: "And you do solemnly swear (or affirm) that there is no collusion, understanding or agreement whatever between yourself and the defendant herein in relation to your application for a divorce." The statute also positively forbids a divorce in any case where the plaintiff is guilty of the same crime or misconduct charged against defendant.[3]

The provision of the statute which forbids a divorce when it appears that the bill is founded on collusion between the parties is mandatory, and is based on public policy, which wisely forbids the annulment of the marriage contract by agreement of the parties.[4] Where both parties are at fault, and where the plaintiff is guilty of the same misconduct as is charged against the defendant, a decree of divorce will also be denied.[5] This provision is an application and legislative sanction of the equitable rule that one who comes into a court of equity, asking for relief and redress of alleged wrongs, must come with clean hands. Divorce is a remedy for the innocent and injured party, and a plaintiff who himself has violated his marriage vows has no standing in a court of equity, to be relieved of the obligations which the marriage relation places upon him, because the other spouse has also broken it. "The law is for the assistance of those who obey it, and not for those who violate it, and, where two parties are both in the same wrong, the court helps neither."[6]

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[1] C. L. 1915, (11400); Howell, 2nd Ed., §11461.

[2] Bradfield v. Bradfield, 154 Mich. 115, 117 N. W. R. 558; Smith v. Smith, 10 N. Dak. 219, 86 N. W. R. 721; Prettyman v. Prettyman, 125 Ind. 149; Schmidt v. Schmidt, 29 N. J. Eq. 496; Bennett v. Bennett, 28 Cal. 600.

[3] C. L. '15, (11401); Howell, 2nd. Ed., §11462.

The statute does not permit the courts to apply the rule of comparative wrong doing, and to grant relief to the one found guilty of the lesser misconduct, against the one found guilty of the greater." The statute contemplates no such rule, and is imperative that no divorce shall be granted in any case where the plaintiff shall be guilty of the same misconduct as that charged against the other party." [7]

## §338. Wife may File Bill in her Own Name.

The wife may file the bill in her own name, as well as the husband, and in all cases the answer to the bill may be without oath or affirmation.[8] And she may become personally liable for attorney fees and expenses in a divorce suit in which she is a party, either as plaintiff or as defendant.[9] "The statute clearly indicates that such proceedings are to be maintained at the cost of the wife, unless the court shall relieve her of such costs by an order for expense money to be paid by the husband."[10]

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[4] Thompson v. Thompson, 70 Mich. 62, 37 N. W. R. 710; Ayres v. Wayne Circuit Judge, 90 Mich. 380, 51 N. W. R. 461; McWilliams v. Lenawee Circuit Judge, 142 Mich. 226, 105 N. W. R. 611.

[5] Warner v. Warner, 54 Mich. 494, 20 N. W. R. 557; Hoff v. Hoff 48 Mich. 281, 12 N. W. R. 160; Morrison v. Morrison, 64 Mich. 53, 30 N. W. R. 903; Minde v. Minde, 65 Mich. 633, 32 N. W. R. 868; Peck v. Peck, 66 Mich. 586, 33 N. W. R. 893. Sissung v. Sissung, 65 Mich. 179, 31 N. W. R. 770; Kellogg v. Kellogg, 171 Mich. 518, 137 N. W. R. 249.

[6] Kellogg v. Kellogg, 171 Mich. 518, 137 N. W. R. 249; 2 Bishop on Marriage and Divorce (5th Ed.) Sec. 87; Stafford v. Stafford, 53 Mich. 522, 19 N. W. R. 201; Warner v. Warner, 54 Mich. 492, 20 N. W. R. 557; Stiehr v. Stiehr, 145 Mich. 297, 108 N. W. R. 684; Root v. Root, 164 Mich. 638, 130 N. W. R. 194, 32 L. R. A. (N. S.) 837, Ann Cases, 1912 B. 740; 14 Cyc. pp. 648-649.

[7] Kellogg v. Kellogg, 171 Mich. 518, 137 N. W. R. 249.

[8] C. L. 1915, (11402); Howell, 2nd. Ed., §11463.

## §339. Temporary Alimony and Expense Money—Costs.

The statute provides that in all suits brought for divorce or separation, the court, in its discretion, may require the husband to pay any sums necessary to enable the wife to defend or carry on the suit during its pendency. The court also, in its discretion, may decree costs against either party and award execution for the same, or it may order such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver.[11] If the wife has no means of support or to defray her necessary expenses in defending or prosecuting the suit, and her husband has property or good earning capacity and opportunity, the court will order him to advance a suitable amount to her for such purposes.[12]

While this section of the statute does not in express terms authorize temporary alimony, it is only confirmatory of the common law, which requires a husband to support his wife while the marriage relation exists. The right to grant temporary alimony has always been recognized in divorce suits when the circumstances required it. Whether this section contemplates advances for support, or must be confined strictly to legal expenses, is of little importance, if any, as such allowances always have been upheld when necessary to prevent a failure of justice, and, in the discretion of the court, may be allowed, although the wife has some property of her own, if the income therefrom is not sufficient for her support.[13]

The amount of temporary alimony and expense money to be allowed rests in the discretion of the court, and should be confined to what is reasonably necessary in each case, due regard being had to the husband's ability and to the circumstances peculiar to the particular case before the court. When the husband's condition is such that his means are not sufficient to maintain his wife and family without the assistance of their labor, she should not receive an allowance so large as to permit her to live in idleness.[14]

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[9] Wolcott v. Patterson, 100 Mich. 228, 58 N. W. R. 1006.

[10] Ross v. Ross, 47 Mich. 185, 10 N. W. R. 193.

[11] C. L. 1915, (11404); Howell, 2nd Ed., §11465.

[12] Story v. Story, Walk. Ch. 421; Goldsmith v. Goldsmith, 6 Mich. 285.

[13] Haines v. Haines, 35 Mich. 143; Rose v. Rose, 53 Mich. 585, 19 N. W. R. 195; Potts v. Potts, 68 Mich. 495, 36 N. W. R. 240.

## §340. Restraint of Liberty of Wife and Care of Children while Suit is Pending.

After the bill has been filed in a suit for divorce or to annul a marriage, the court in which the suit is pending, on petition of the wife, may prohibit the husband at any time, either in term or vacation, from imposing any restraint on her personal liberty during the pendency of the suit.[15] The court also, on the application of either party, may make such order concerning the care and custody of the minor children of the parties, and their suitable maintenance during the pendency of the suit, as shall be deemed proper and necessary, and for their benefit.[16]

## §341. Custody and Care of Children on Final Decree.

Upon granting a sentence or decree of nullity, or upon decreeing a divorce, whether absolute or limited, it is the duty of the court to make such further decree as shall be just and proper concerning the care, custody and maintenance of the minor children of the parties; and the court may determine, and provide in the decree, with which of the parents the children, or any of them, may remain.[17]

As a general rule it may be said that the mother is entitled to the care and custody of all such children under twelve years of age, and the father to the care and custody of those of the age of twelve years or more.[18] This rule, however, which is statutory, is not so mandatory as to make the ages of the children the arbitrary test of their custody, either temporarily during the pendency of the suit, or permanently by final decree. The statute has never been construed as qualify-ing or restricting the inherent, broad, discretionary powers of a court of chancery to adjudicate as to the custody and control of children whose interests are before it, according to the varying elements for consideration arising in each case, and to make such disposition of each child as its best interests appear to demand.[19] The section, taken as a whole, indicates that it was intended as a general guide for the courts when in doubt as to which of the parents is the more fit, or when neither is shown to be unfit to have the care and custody of the young children. It has been construed to mean that *prima facie* the mother is best entitled to the custody of very young children, favoring her in that respect, and as meaning that there should be preponderating reasons in favor of the father before a provision different from that pointed out by the statute should be made.[20] The paramount consideration is which parent is best fitted and will be most likely to give the interests of the children the best consideration. Neither parent has any right to the custody of the child if such custody would seriously militate against its welfare.[21]

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[14] Ross v. Griffin, 53 Mich. 7, 18 N. W. R. 534; Froman v. Froman, 53 Mich. 581, 19 N. W. R. 193; Jordan v. Jordan, 62 Mich. 178; Brown v. Brown, 22 Mich. 242.

[15] C. L. 1915, (11405); Howell, 2nd. Ed. §11466.

[16] C. L. 1915, (11406); Howell, 2nd. Ed. §11467.

[17] C. L. 1915, (11407); Howell, 2nd. Ed., §11468.

[18] C. L. 1915, (11484); Howell, 2nd. Ed., §11537.

A decree providing for the care, custody and maintenance of the minor children of divorced parties, is not beyond the power of the court to revise or change. The court, from time to time after the decree, on the application of either of the parents, may revise and alter such a decree, and make a new one concerning the same subject, as the circumstances of the parents, and the benefit of the children, may require.[22]

### §342. Wife Entitled to her Real Estate—When.

The statute provides that "whenever the nullity of a marriage, or a divorce from the bond of matrimony for any cause excepting that of adultery committed by the wife, shall be decreed, and when the husband shall be sentenced to imprisonment for life, and also upon every divorce from bed and board, the wife shall be entitled to the immediate possession of all her real estate, in the like manner as if her husband were dead."[23]

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[19] Weiss v. Weiss, 174 Mich. 435, 140 N. W. R. 587.

[20] Klein v. Klein, 47 Mich. 518, 11 N. W. R. 367; In Re Knott, 162 Mich. 10, 126 N. W. R. 1040.

[21] Corrie v. Corrie, 42 Mich. 509, 4 N. W. R. 213.

[22] C. L. 1915, (11408); Howell, 2nd. Ed., §11469; Griffin v. Griffin, 154 Mich. 536, 118 N. W. R. 1; Stone v. Stone, 161 Mich. 565, 126 N. W. R. 710; Dailey v. Dailey, 166 Mich. 170, 131 N. W. R. 526.

If a husband and wife are the owners of real estate as joint tenants or tenants by entireties, upon being divorced they become tenants in common of such real estate, unless the ownership thereof is otherwise determined by the decree of divorce.[24]

## §343. Restoration of Personal Estate of Wife.

The statute also provides that "upon every such dissolution of a marriage as is specified in the preceding section, and also upon every divorce from bed and board, the court may make a further decree for restoring to the wife the whole, or such part as it shall deem just and reasonable, of the personal estate that shall have come to the husband by reason of the marriage, or for awarding to her the value thereof, to be paid by her husband in money.[25]

Where it appeared that a wife had put money into her husband's business, but that he had conveyed land to her which was a full equivalent therefor and of her full share of the property, upon granting to her a decree of divorce the court properly denied her claim for property or money from the defendant.[26]

A suit for divorce is not a proper proceeding in which to secure an accounting for the wife's property which does not relate to or grow out of the marriage relation, but is her separate estate and subject to her sole control.[27] And as a general rule third persons cannot be made parties to a divorce proceeding. But where a third person has conspired with a husband to procure the transfer of property which is subject to the wife's claim for alimony, with intent to defraud her out of her interest in such property held by reason of her marital rights in the same, such third person may be impleaded with the husband.[28]

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[23] C. L. 1915, (11409); Howell, 2nd. Ed., §11470; Johnson v. Johnson, Wal. Ch. 313.

[24] Howell, 2nd. Ed., §11497.

[25] C. L. 1915, (11410); Howell, 2nd. Ed., §11471.

[26] Harrison v. Harrison, 49 Mich. 240, 13 N. W. R. 581.

[27] Peck v. Peck, 66 Mich. 591, 33 N. W. R. 894; Letts v. Letts, 73 Mich. 138, 41 N. W. R. 99; Uhl v. Uhl, 52 Cal. 250.

[28] Peck v. Peck, 66 Mich. 586, 33 N. W. R. 894; Damon v. Damon, 28 Wis. 510; Van Duzer, v. Van Duzer, 6 Paige, 366.

## §344. Trustees When May be Appointed.

Upon every divorce for adultery committed by the husband, and upon every divorce from bed and board for any cause, when any personal estate of the wife, or money in lieu thereof, shall be awarded to her as provided in the preceding section, the court, instead of ordering it to be delivered or paid into the hands of the wife, may order it to be delivered or paid into the hands of a trustee or trustees, to be appointed by the court, upon trust to invest the same, and to apply the income thereof to the support and maintenance of the wife, and of the minor children of the marriage, or any of them, in such manner as the court shall direct.[29]

## §345. Duties of Trustees—Bonds.

Such trustees shall also pay over the principal sum to the wife and children of the marriage, when ordered by the court, in such proportions and at such times as the court shall direct, regard being had, in the disposition of the said income, as well as the principal sum, to the situation and circumstances of the wife and children; and the said trustees shall give such bonds as the court shall require for the faithful performance of their trust.[30] These two sections have remained on the statute books of this state from the time of their enactment to the present time.[31]

It is somewhat difficult to understand just what reasons could exist for the appointment of a trustee for the wife where an absolute divorce is granted to the wife on the ground of the adultery of the husband, which might not also apply with equal force to a similar decree granted for any other cause.

Many reasons might be given for the services of a trustee to care for and use, under the direction of the court, such money or property as might be awarded for the maintenance of the wife and minor children where the decree is for a divorce from bed and board for a limited time.

The passage of the married women's act of 1855, it would seem, makes inoperative many of the provisions of statutes adopted prior to that time, so far as such earlier statutes relate to the property rights of husband and wife.

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[29] C. L. 1915, (11411); Howell, 2nd. Ed., §11472.

[30] C. L. 1915, (11412); Howell, 2nd. Ed. §11473.

[31] Mich. R. S. 1846, Ch. 84, Secs. 20 and 21, page 334.

### §346. Husband to Disclose on Oath.

Whenever the court shall think proper to award to the wife any personal estate, or money in lieu thereof, in pursuance of the foregoing provisions, such court may require the husband to disclose on oath what personal estate has come to him by reason of the marriage, and how the same has been disposed of, and what portion still remains in his hands.[32]

## *Alimony.*

### §347. Permanent Alimony.

The statute provides for the payment to the wife of permanent alimony in all cases of absolute divorce for any cause except that of adultery committed by the wife, and also upon every divorce from bed and board for any cause. This may be by a decree of a part of the personal estate of the husband, or out of his real estate. The decree may provide for a payment to the wife in gross or otherwise, as the court may deem just and reasonable, having regard to the ability of the husband and the character and situation of the parties.[33]

Courts of chancery have no inherent power to decree permanent alimony. The power is a statutory one, incident to the jurisdiction over application for divorce. The statute prescribes the entire powers of the court on the subject. The jurisdiction is statutory, and cannot be extended beyond the authority given by the statute.[34] In the early case of Pellier vs. Pellier, Har. Ch. 19, it was held that a court of Chancery has no jurisdiction of a case where a bill is filed for alimony merely. A subsequent statute, however, provides for filing a bill for alimony and support merely, in certain cases of desertion and neglect by the husband.[35]

A divorce from the bonds of matrimony, or one from bed and board, is necessary before the court may further decree to the wife alimony out of the personal or real estate of the husband.[36]

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[32] C. L. 1915, (11413); Howell, 2nd. Ed., §11474.

[33] C. L. 1915, (11414); Howell, 2nd. Ed., §11475.

[34] Perkins v. Perkins, 16 Mich. 161; Peltier v. Peltier, Har. Ch. 19.

[35] C. L. 1915, (11479); Howell, 2nd. Ed. §11534.

[36] Nichols v. Nichols, 169 Mich. 540, 135 N. W. R. 328.

The alimony should be fixed by the judge who hears the evidence.[37]

The power of the court to award and fix the amount of alimony to be paid to a wife in a divorce proceeding is statutory and rests to some extent in the discretion of the trial court.[38]

The power of the courts to grant alimony is limited to the cases pointed out by the statute. The court of chancery has no inherent power to award permanent alimony, and while the statute gives such court authority to grant alimony to the wife for the support of herself and minor children, and to create a lien against the husband's property to secure its payment, it confers no such power to decree the payment of any sum to the children on their reaching majority, or even during minority, or to create a lien to secure the payment of such award.[39]

A decree, entered by consent of the defendant in a divorce proceeding, providing for the payment of a stipulated sum to the wife's mother, and certain sums in lump to the children at their majority, and creating a lien on real estate to secure the payment of the same, exceeds the jurisdiction of the court, and such provisions are void and cannot operate as a family settlement.[40]

In such special proceedings as divorce and partition, the court of chancery must be considered as of limited and special jurisdiction, concerning which no such presumption is indulged as prevails in actions at common law, or suits under the general equitable jurisdiction. It is a recognized doctrine that parties, by their consent, cannot confer jurisdiction over a subject-matter upon courts from which the law has withheld it.[41]

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[37] Mincer v. Wayne Circuit Judge, 163 Mich. 628, 128 N. W. R. 734.

[38] Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. R. 287; Maslen v. Anderson, 163 Mich. 477, 128 N. W. R. 723. Bialy v. Bialy, 167 Mich. 559, 133 N. W. R. 496.

[39] Maslen v. Anderson, 163 Mich. 481, 128 N. W. R. 723; Perkins v. Perkins, 16 Mich. 162; Baugh v. Baugh, 37 Mich. 59, 26 Am. R. 495; Peck v. Peck, 66 Mich. 588, 33 N. W. R. 893; Peck v. Uhl, 66 Mich. 592, 33 N. W. R. 893; Peltier v. Peltier, Har. Ch. 19; Swiney v. Swiney, 107 Mich. 459, 65 N. W. R. 287.

[40] Maslen v. Anderson, 163 Mich. 477, 128 N. W. R. 723.

[41] Platt v. Stewart, 10 Mich. 265; Merrill v. Montgomery, 25 Mich. 73; Weimer v. Bunbury, 30 Mich. 201; Kirkwood v. Hoxie, 95 Mich. 62, 54 N. W. R. 720, 35 Am. St. R. 549; Brown v. Fletchers Estate, 146 Mich. 401, 109 N. W. R. 686; Brown on Jurisdiction, pp. 28, 29; 11 Cyc. 693 and note.

## §348. Ascertainment of Amount.

In ascertaining the amount to be awarded as permanent alimony no arbitrary rule can be laid down, and the courts have seldom, if ever, attempted to do so. Each case must be determined according to its own peculiar circumstances. The ability of the husband to pay, the circumstances surrounding and the character of the act constituting the grounds for the divorce, the earning capacity of both husband and wife, the number and ages of the minor children, the financial circumstances of both husband and wife, the age and physical condition of the parties, the length of time the parties have been married and lived together, whether the property of the husband has been accumulated by the joint effort and labor of the husband and wife, and all of the circumstances surrounding each particular case, should be ascertained and considered by the court whose duty it is to make the award.[42]

## §349. Limitation of Power of Court to Award.

Within the provisions of the statute, the power to award alimony in a divorce proceeding, and the extent of such allowance, are largely in the discretion of the court. The wife may be awarded alimony in a decree of divorce granted on the application of the husband, for her misconduct, except where the divorce is granted on account of adultery.[43] On the other hand, alimony may be denied a wife, even upon a decree of divorce obtained by her upon a charge of cruelty, where the circumstances are such as to make it appear that she has not suffered to any great extent from the treatment complained of, and where it further appears that she has already received from her husband an amount of property not very disproportionate to the amount of alimony which might otherwise have been allowed her.[44]

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[42] Brasch v. Brasch, 168 Mich. 459, 134 N. W. R. 450; Des Champlain v. Des Champlain, 164 Mich. 511, 129 N. W. R. 702; Brandan v. Brandan, 166 Mich. 462, 131 N. W. R. 1099; Baily v. Baily, 167 Mich. 559, 133 N. W. R. 496; Delor v. Delor, 159 Mich. 624, 124 N. W. R. 554; Lawler v. Lawler. 157 Mich. 107, 121 N. W. R. 294; Kraft, v. Kraft, 160 Mich. 645, 125 N. W. R. 693; Robson v. Robson, 161 Mich. 293, 126 N. W. R. 216; Horning v. Horning, 162 Mich. 130, 127 N. W. R. 369; Ferguson v. Ferguson, 147 Mich. 673, 111 N. W. R. 175.

[43] Lofvander v. Lofvander, 146 Mich. 37, 109 N. W. R. 662.

[44] Stevens v. Stevens, 49 Mich. 504, 3 N. W. R. 835.

Where it appeared that a wife thirty-two years of age left her husband, who was forty-eight years old, without reasonable cause after thirty-seven days of married life, and notwithstanding his efforts to please her, and within a few days thereafter had a miscarriage, an allowance of one thousand dollars to her as alimony from his property worth seven thousand dollars was held to be excessive, and the amount was reduced to five hundred dollars and one hundred dollars solicitor's fees.[45]

## §350. Testimony—When and how Taken.

As a general rule the proofs for the purpose of determining the proper award for permanent alimony should not be taken until it is determined whether a divorce will be decreed.[46] Since the passage of the Judicature Act of 1915, however, in all chancery cases the testimony is required to be taken in open court as in suits at law, unless the court shall specially order a reference to a circuit court commissioner, or other person authorized by law to administer oaths, to take such testimony.[47]

This statute does not preclude the court from making an order to refer a chancery case to a circuit court commissioner to take the proofs. The court will entertain a special application to refer the case, and, if a proper showing is made, the court may in its discretion order such reference.[48]

A gross sum for alimony may be decreed. Experience has shown that a defendant sometimes tries to evade the payment of an annuity, where he could not or would not be likely to be successful in evading the payment of a gross sum. In cases where there is reason to apprehend vexatious delays in payment, a gross sum should be awarded in preference to annuity.[49]

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[45] Lofvander v. Lofvander, 146 Mich. 370, 109 N. W. R. 662.

[46] Rea v. Rea, 53 Mich. 40, 18 N. W. R. 551.

[47] C. L. 1915, (12489); Cummins & Beechers J. A. §612. The judicature act also provides (page 28) that testimony to be used in any circuit court, in chancery may be taken before a justice of the peace or notary public, if the parties interested, their agent or attorney, shall enter into a stipulation to that effect, in writing, and file the same with the clerk of the circuit court of the proper county.

[48] Reynolds v. Reynolds, 92 Mich. 104, 52 N. W. R. 295; Briggs v. Briggs, 20 Mich. 46.

[49] Skillman v. Skillman, 18 Mich. 458; Hamilton v. Hamilton, 37 Mich. 606; Taylor v. Gladwin, 40 Mich. 234; Seibly v.

### §351. Dower—When Wife Entitled to.

Under some circumstances a wife, upon obtaining a divorce, is entitled to dower in her husband's lands in the same manner as if he were dead. The statute provides that, "when the marriage shall be dissolved by the husband being sentenced to imprisonment for life, and when a divorce shall be decreed for the cause of adultery committed by the husband, or for the misconduct or habitual drunkenness of the husband, or on account of his being sentenced to imprisonment for a term of three years or more, the wife shall be entitled to her dower in his lands in the same manner as if he were dead; but she shall not be entitled to dower in any other case of divorce."[50]

Where a wife has been granted a divorce under such circumstances that she is entitled to her dower interest in her husband's lands, and provision for her support, the parties are competent to contract that, in consideration of her foregoing enforcement of her rights during his lifetime, he will make adequate provision by will for her support; and a court of equity will entertain a bill for specific performance of such contract.[51]

Whenever a divorced woman becomes entitled to dower in her husband's lands, her right vests as soon as the decree becomes final.[52]

A divorced wife's right to dower in her husband's lands is not based upon the decree but upon the statute, and therefore her right to recover possession is not barred in ten years, the time limited for bringing actions upon judgments and decrees, but only by the fifteen years allowed by statute for the recovery of the possession of lands.[53] The decree of divorce is only the evidence that the event has taken place which gives the wife the right to dower, and fixes the time when her right of action accrues. The statute of limitations in regard to real actions for the recovery of the possession of land controls.

Judge, 105 Mich. 584, 63 N. W. R. 528; Bialy v. Bialy, 167 Mich. 559, 133 N. W. R. 496; McClung v. McClung, 40 Mich. 498.

[50] C. L. 1915, (11415); Howell, 2nd. Ed., §11476; Jordan v. Jordan, 53 Mich. 550, 19 N. W. R. 180.

[51] Kundinger v. Kundinger, 150 Mich. 630, 114 N. W. R. 408.

[52] Percival v. Percival, 56 Mich. 297, 22 N. W. R. 807; Orth v. Orth, 69 Mich. 158, 37 N. W. R. 67; Bowles v. Hoard, 71 Mich. 150, 39 N. W. R. 24; And she can maintain ejectment once for her dower, Percival v. Percival, 56 Mich. 297, 22 N. W. R. 807.

[53] Moross v. Moross, 132 Mich. 203, 93 N. W. R. 247.

A stipulation in divorce proceedings that the payment of a specified sum of money and the conveyance of certain lands to the wife shall be in full for all expenses and alimony against the husband, will release the wife's dower rights, although there is no express mention of dower in such stipulation, if such is the intention and understanding of the parties.[54]

Under the provision of the statute giving a wife the right to dower in the lands of her husband who has been sentenced to imprisonment for life, her right vests as soon as the sentence is passed, and she may have such dower assigned at once, or bring an action of ejectment for its recovery, without procuring a decree of divorce. This is because the marriage is absolutely dissolved by the sentence of the husband to imprisonment for life, and the husband's subsequent pardon will not restore him to his conjugal rights.[55] If, in such a case, the husband should appeal from the judgment of life sentence, the wife's right to dower would probably be suspended until such time as the judgment or sentence became absolute; and, if it were reversed and set aside, an acquittal of the charge afterwards would probably restore to the parties all their conjugal rights, although a pardon would not.

## §352. Lien on Real and Personal Estate.

The statute provides that "in all cases where alimony or allowances for the support and education of minor children shall be decreed to the wife, the amount thereof shall constitute a lien upon such of the real and personal estate of the husband as the court by its decree shall direct, and in default of payment of the amount so decreed, the court may decree the sale of the property against which such lien is decreed, in the same manner and upon like notice as in suits for the foreclosure of mortgage liens."[56]

Prior to 1877, the statute did not authorize the court to declare a lien on the lands of the husband to secure permanent alimony to be paid to the wife. A court of equity has no inherent power to create liens on real estate, and has no general power, independent of statute, to declare alimony to be a specific charge upon lands, or to direct such lands to be sold in default of payment.[57] Jurisdiction over alimony being statutory, it cannot be extended beyond the statutory authority, which, prior to 1877, allowed only a sequestration of rents and profits of realty where the defendant had been ordered to give security and had neglected or refused to do so.[58] In 1877, however, the legislature, by Act No. 44, so amended the former statute as to make an allowance for alimony decreed to the wife for the support and education of the children of the marriage, a lien upon such of the real and personal estate of the husband as the court by its decree directs.[59]

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[54] McKelvey v. McKelvey, 112 Mich. 274, 70 N. W. R. 582, Owen v. Yale, 75 Mich. 256, 42 N. W. R. 817; Adams v. Story, 135 Ill. 448, 25 Am. St. R. 392.

[55] C. L. 1915, (11396); Howell, 2nd. Ed., §11457.

[56] C. L. 1915, (11416); Howell, 2nd. Ed. §11477.

### §357. Enforcement of Lien.

When an award of alimony becomes a lien upon the real and personal estate of the husband, and the award is not paid, the statute provides that the court may decree the sale of the property against which such lien is decreed in the same manner and upon like notice as in suits for the foreclosure of mortgage liens.[60] In such cases the decree for divorce and alimony should designate the particular property of the husband which is to be subjected to the lien. The language of the statute seems to indicate that the court may decree the lien against the whole or any part of the husband's real or personal property. The statute creates the lien, but the court designates against what property of the husband it shall be enforced. A sale of such property, however, cannot lawfully be made under such decree, without some further order adjudging the defendant to be in default, and ascertaining the amount.[61] The provisions of the decree awarding alimony and the designation of the property of the husband against which a lien may be enforced are the sole origin of the responsibility of the husband. The object of these provisions is to create a debt payable in the future, and to place that debt on a footing similar to that of a mortgage on the property designated by the decree to be subject to the lien. The decree cannot adjudicate in advance for future defaults. No court, either of law or of equity, can lawfully direct judgment to go against a party, or against his property, until his default has been made out.

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[57] Perkins v. Perkins, 16 Mich. 161.

[58] Bennett v. Nichols, 12 Mich. 22; Story v. Story, Walk. Ch. 421; Peltier v. Peltier, Har. Ch. 19.

[59] P. A. 1877, Act No. 44; P. A. 1897, Act No. 197; C. L. 1915, (11416); Howell, 2nd. Ed. §11477.

[60] C. L. 1915, (11416); Howell, 2nd. §11477.

[61] Perkins v. Perkins, 16 Mich. 165.

The determination of the amount of any debt actually due, which is to stand as the basis of a judicial sale or execution, is a judicial act; and a hearing must precede the condemnation.[62]

The court has power under the statute to make the award against the husband, in a divorce proceedings, for the support of the children, a charge upon his property, and alter it from time to time in the interests of justice, and on the death of the husband will fix the period for which the payments must continue, calculate and determine their present worth, and make the sum a lien upon his property, with priority over all other claims of his widow, heirs, and next of kin, except rights of dower. The provision in a decree of divorce against the husband for the payment of a certain sum monthly, until the further order of the court, for the support of children, is not discharged by the husband's death.[63]

## §358. Execution to Collect—Sale or Division of Property.

The same section of the statute which authorizes a lien on the husband's real and personal property to secure the payment of alimony awarded to the wife provides that "the court may award execution for the collection of the same, or the court may sequester the real and personal estate of the husband and may appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate to be applied to the payment thereof, or the court may in lieu of a money allowance decree such a division between the husband and wife of the real and personal estate of the husband or of the husband and wife by joint ownership or right as he shall deem to be equitable and just."[64] This section applies to permanent alimony only. An execution cannot be awarded under this section to collect temporary alimony.[65]

Where a decree, giving the wife one-third of the husband's property for alimony, permitted him to discharge it by setting off to her ten thousand dollars in land, it was held that the land should be estimated to her according to the value as shown by the proofs in the case, and not by subsequent enhanced valuation.[66]

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[62] Perkins v. Perkins, 16 Mich. 165.

[63] Creyts v. Creyts, 143 Mich. 375, 106 N. W. R. 1111.

[64] C. L. 1915, (11416); Howell, 2nd. Ed., §11477; Edison v. Edison, 56 Mich. 185, 22 N. W. R. 264; Potts v. Potts, 68 Mich. 492, 36 N. W. R. 240.

[65] Palmer v. Palmer, 45 Mich. 150, 7 N. W. R. 760.

Under this section, on granting a decree of divorce, real estate held by the parties as tenants by entireties may be divided.[67]

The court may also award a sum in gross, which becomes payable presently, or the court may sequester the real and personal estate of the husband, and appoint a receiver thereof, and cause the personal estate and the rents and profits of the real estate to be applied to the payment of alimony.

And the better practice is for the court to determine in the first instance the right to decree a divorce, and to reserve the question of alimony for subsequent adjudication.[68]

Where a decree of divorce reserves for subsequent consideration and adjudication the question of the amount of alimony to be awarded the wife, and the husband dies pending such adjudication, the court is not ousted of jurisdiction to award permanent alimony under the provisions of the statute authorizing the court to award a gross sum as permanent alimony. The statute seems to have changed or modified the general rule that the death of either party to a divorce suit *pendente lite* abates the suit, and that a proceeding to enforce alimony, at common law, abates on the death of either party.

The reason of the general rule referred to, in the first instance, is that the purpose for which the proceeding is pending—namely, the dissolution of the marriage—is accomplished, and, in the second instance, that at common law alimony consisting, as it does, of provision for the support of the wife, on a divorce from bed and board, by means of an allowance to be paid by the husband, the proceeding to enforce it relates to conditions which exist only during the life of the two.

But the statute has changed the general common law rule by authorizing an award of money in gross, which becomes presently payable, or a division of the property. If it results that the death of the husband, after a decree of divorce has been granted, and pending the determination of the question of alimony, ousts the court of jurisdiction to award permanent alimony to the wife, it follows that in every case where a decree is made dissolving the marriage and reserving the consideration and determination of the question of alimony for subsequent adjudication, there must be a period of greater or less duration, during which the wife is at the risk of losing the interest in her husband's estate which she would have under the statute of distributions but for the divorce. Under such conditions the wife is placed in a position by the decree of divorce which precludes her from sharing as a widow in her husband's estate, if she is precluded by his death from enforcing her right to alimony.[69]

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[66] McClung v. McClung, 42 Mich. 53, 3 N. W. R. 250.

[67] Jeske v. Jeske, 147 Mich. 367, 110 N. W. R. 1060; Brasch v. Brasch, 168 Mich. 461, 134 N. W. R. 450. As to ascertainment of husband's property and division between husband and wife see; Carnahan v. Carnahan, 143 Mich. 390, 107 N. W. R. 73.

[68] Rea v. Rea, 53 Mich. 40, 18 N. W. R. 551; Seibly v. Person, Circuit Judge, 105 Mich. 584, 63 N. W. R. 528; Miller v. Clark, 23 Ind. 370; Stewart, Mar. & Div., 376.

In a proceeding for an award of alimony against such deceased husband's estate, where he dies after the decree dissolving the marriage has been entered and before the adjudication of the question of alimony reserved for further order and direction, the heirs and other personal representatives of the deceased husband must be made parties.[70]

## §359. Suit to Foreclose Lien.

Where a decree for alimony in a gross sum provides it shall be a lien on real estate, a suit to foreclose such lien may be maintained in case of default of payment according to the terms of the decree. If the decree is made a lien on land situated in another county than the one in which the decree was rendered, the suit to foreclose the lien must be instituted in the county where the land or some part of it is situated. The statute provides that in default of payment of the amount of alimony decreed, the court may decree the sale of the property charged with the lien "in the same manner and upon like notice as in suits for the foreclosure of mortgage liens."[71] The provision of the statute relating to the foreclosure of mortgage liens provides that "all bills for the foreclosure or satisfaction of mortgages shall be filed in the circuit court in chancery of the county where the mortgaged premises, or any part thereof, are situated."[72]

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[69] Seibly v. Ingham Circuit Judge, 105 Mich. 584, 63 N. W. R. 528.

[70] Shafer v. Shafer, 30 Mich. 163; Seibley v. Ingham Circuit Judge, 105 Mich. 587, 63 N. W. R. 528.

[71] C. L. 1915, (11416); Howell, 2nd. Ed. §11477.

A decree for alimony in a fixed sum is generally held to be a judgment of record and will be received by other courts as such. Such a decree rendered in any state of the United States may be carried into judgment in any other state.[73] But when suit is brought in one state upon a decree for a fixed sum of alimony rendered in another state, the measure of recovery must be the amount due on the decree at the time the suit is instituted. This is because the court which rendered the decree has power to revise or alter such decree as to the amount, from time to time, on the application of either party.[74]

And the decree awarding alimony must have been rendered by a court having jurisdiction of the parties and of the subject matter, or it will not be sufficient to lay the foundation for a personal judgment in another state. A decree which is void for want of jurisdiction will not support a judgment in personam awarding alimony.[75] While notice by publication in accordance with the laws of the state is sufficient to give the court jurisdiction to dissolve the marriage, such substituted service is not sufficient to lay the foundation for a personal judgment for alimony.[76]

An award of alimony is a valid claim against the estate of the claimant's divorced husband, deceased, for the time elapsing between the date of the decree and the subsequent remarriage of the claimant, where the decedent in his life-time took no steps toward a modification of the award.[77]

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[72] C. L. 1915, (12676); Cummins & Beecher's Mich. Judicature Act, §799; Howell, 2nd. Ed. §12033; Ulman v. Ulman, 148 Mich. 353, 111 N. W. R. 1072.

[73] Lynde v. Lynde, 162 N. Y. 405, 48 L. R. A. 679, 181 U. S. 183, 45 L. Ed. 810; Barber v. Barber, 21 How. U. S. 582, 16 L. Ed. 226.

[74] Lynde v. Lynde, 181 U. S. 183, 45 L. Ed. Book 810.

[75] Erkenbrach v. Erkenbrach, 96 N. Y. 456; Signey v. Signey, 127 N. Y. 408, 28 N. E. R. 405.

[76] Potter v. Ogden, 136 N. Y. 344, 33 N. E. R. 331; Kilburn v. Woodworth, 5 Johns. 27, 4 Am. Dec. 321; People v. Baker, 76 N. Y. 78, 32 Am. R. 274; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Cooley on Constitutional Limitation, 405; St. Clair v. Cox, 106 U. S. 350, 27 L. Ed., 222, 1 Sup. Ct. R. 354; Harkness v. Hyde, 98 U. S. 476, 25 L. Ed., 237; Owens v. Henry, 161 U. S. 642, 40 L. Ed. 837, 16 Sup. Ct. R. 693; Henrietta Mining and Milling Co. v. Johnson, 173 U. S. 221, 43 L. Ed. 675, 19 Sup. Ct. R. 402.

[77] Martin v. Thison's Estate, 153 Mich. 516, 116 N. W. R. 1013, 18 L. R. A. (N. S.) 257.

In Massachusetts it is held that as alimony out of a husband's property is a provision for the support of the wife by him, the obligation to pay it in the future necessarily ceases with the death of the husband; but amounts already due at the time of his death are in the nature of a debt then existing, and are payable out of his estate.[78]

In Wisconsin it has been held that a divorced wife, after the death of her husband, can enforce payment by his administrator of arrearage of alimony due her, only by proceedings as for a claim against the decedent's estate in the manner prescribed by the statutes pertaining thereto; and that a motion in the divorce suit that the administrator be ordered to pay the judgment for alimony is ineffectual.[79]

But during the life of both parties, a decree for alimony, though awarded in a gross sum, and the time of payment fixed by the decree, is not such a debt as will be discharged by an adjudication in bankruptcy, or that may be sued upon in a court of law.[80]

## §360. Court may Alter Decree.

The statute provides that "after a decree for alimony or other allowance for the wife and children, or either of them, and also after a decree for the appointment of trustees to receive and hold any property for the use of the wife and children as before provided, the court may, from time to time, on the petition of either of the parties, revise and alter such decree respecting the amount of such alimony or allowance and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any decree respecting any of the said matters which such court might have made in the original suit."[81]

This statute has been construed as authorizing the change only on new facts thereafter transpiring, which are of such a character as to make the change necessary to suit such new state of facts.[82]

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[78] Knapp v. Knapp, 134 Mass. 353.

[79] Guenthers Appeal, 40 Wis. 115.

[80] Nixon v. Wright, 146 Mich. 231, 109 N. W. R. 274, 10 Am. & Eng. Ann. Cas. 547; Post v. Neafie, 3 Cains, (N. Y.) 34; Allen v. Allen, 100 Mass. 373; Knapp v. Knapp, 134 Mass. 353; Barber v. Barber, 2 Pin. (Wis.) 297; Kempster v. Evans, 81 Wis. 247, 51 N. W. R. 327, 15 L. R. A. 391.

[81] C. L. 1915, (11417); Howell, 2nd. Ed. §11478.

A decree awarding the custody of a child to its mother, and a weekly allowance for its support, will not be subsequently modified upon a showing of facts which were known to the petitioning party to have existed at the time the decree was rendered. Notwithstanding that the amount of alimony fixed in the decree is determined by agreement of the parties at the time the decree is signed, the court afterwards may modify the decree upon petition of one of the parties showing such a change of circumstances as makes such modification or alteration necessary. The statute was enacted for the benefit of the children as well as the parents, and any agreement which the parents may make in the settlement of alimony does not bind the conscience of a court of equity as to what is for the welfare of the children.[83]

Other alleged misconduct and defenses which existed at the time of the decree, and might have been shown, constitute no valid reason for modification of a decree as to alimony.[84]

A court of equity has jurisdiction to modify a decree of divorce awarding alimony in installments, after the death of the defendant husband, so as to grant a gross sum out of the estate of the deceased in lieu thereof.[85]

Reduction of alimony is not warranted by reason of remarriage of the defendant husband, or the fact that the wife has alienated his daughter's affection from him.[86]

If a decree of divorce does not provide for alimony, and the question of alimony is not reserved in such decree for further directions, an allowance for alimony cannot afterwards be made.[87]

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[82] Perkins v. Perkins, 12 Mich. 450; Chandler v. Chandler, 24 Mich. 176.

[83] Camp v. Camp, 158 Mich. 221, 122 N. W. R. 521; Aldrich v. Aldrich, 166 Mich. 248, 131 N. W. R. 542.

[84] Camp. v. Camp, 158 Mich. 221, 122 N. W. R. 521.

[85] Pingree v. Pingree, 170 Mich. 36, 135 N. W. R. 923; Adams v. Seibly, 115 Mich. 402, 73 N. W. R. 377; Creyts v. Creyts, 143 Mich. 375, 106 N. W. R. 1111; Shafer v. Shafer, 30 Mich. 163; Seibly v. Ingham Circuit Judge, 105 Mich. 583, 63 N. W. R. 528; Smith v. Waalkes, 109 Mich. 16, 66 N. W. R. 679; Miller v. Miller, 64 Me. 484; Maslen v. Anderson, 163 Mich. 477, 128 N. W. R. 723; Brown v. Brown, 135 Mich. 141, 97 N. W. R. 396; A monthly allowance to a wife for the support and maintenance of a child is "alimony" within the meaning of Act No. 830, P. A. 1899, authorizing the enforcement of a decree for alimony through imprisonment for contempt. Brown v. Brown, 135 Mich. 141, 97 N. W. R. 396.

[86] Smith v. Smith, 139 Mich. 133, 102 N. W. R. 631.

### §361. Legitimacy of Children in Certain Cases—Adultery—Former Spouse Living—Non-Age.

A divorce for the cause of adultery committed by the wife does not affect the legitimacy of the children of the marriage, and the legitimacy of such children, if questioned, may be determined by the court upon the proofs heard in the cause.

In every case the legitimacy of all children begotten before the commencement of the suit must be presumed until the contrary is shown.[88]

Whenever a marriage is dissolved on account of a prior marriage of either party, and it shall appear that the second marriage was contracted in good faith, and with the full belief of the parties that the former wife or husband was dead, that fact must be stated in the decree of divorce or annulment; and the issue of such second marriage, born or begotten before the commencement of the suit, will be deemed to be the legitimate issue of the parent who, at the time of the marriage, was capable of contracting.[89]

Upon the dissolution of a marriage on account of non-age, insanity or idiocy of either party, the issue of such marriage is deemed to be in all respects the legitimate issue of the parent who, at the time of the marriage, was capable of contracting.[90]

### §362. Co-habitation after Divorce—How Punished.

If, after being divorced, the parties cohabit together without being remarried, they are liable to the penalties and punishment provided by law against adultery.[91] This provision of the statute does not make the cohabitating parties guilty of the crime of adultery, but provides that the punishment for such cohabitation shall be the same as the law prescribes for adultery.

### §363. Who may File Bill to Annul Marriage—In Case of Non-Age—Idiocy or Lunacy.

A bill to annul a marriage on the ground that one of the parties was under the age of legal consent at the time of the marriage was celebrated, may be exhibited by the parent or guardian entitled to the custody of such minor; or by the next friend of such minor; but in no case can such marriage be annulled on the application of the party to the marriage who was of the legal age of consent at the time of the marriage, nor when it shall be made to appear that the parties, after they had attained the age of legal consent, had freely and voluntarily cohabited as husband and wife.[92]

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[87] Moross v. Moross, 129 Mich. 27, 87 N. W. R. 1035.

[88] C. L. 1915, (11418); Howell, 2nd. Ed. §11479.

[89] C. L. 1915, (11420); Howell, 2nd. Ed., §11481.

[90] C. L. '97, (11419); Howell, 2nd. Ed., §11480.

[91] C. L. 1915, (11421); Howell, 2nd. Ed. §11482.

A bill to annul a marriage on the ground of insanity or idiocy may be exhibited by any person admitted by the court to prosecute as the next friend of such idiot or lunatic.[93] The marriage of a lunatic may also be declared void upon the application of the lunatic, after the restoration of reason; but in such case no sentence of annulment can be pronounced by the court, if it shall appear that the parties freely cohabited as husband and wife after the lunatic was restored to a sound mind.[94]

### §364. Annulment—Force or Fraud—Denied When—Custody of Children.

A marriage cannot be annulled on the ground of force or fraud in the procurement of the marriage if it appears that, at any time prior to the commencement of the suit, there was a voluntary cohabitation of the parties as husband and wife.[95]

When a marriage is dissolved or annulled on the ground of force or fraud in its procurement, the custody of the children of such marriage will be given to the innocent parent, and the court may also decree a provision for their support and education out of the estate and property of the guilty party.[96]

### §365. Physical Incapacity—Limitations.

A suit to annul a marriage on the ground of the physical incapacity of one of the parties at the time of the marriage can be maintained only by the injured party, against the party whose incapacity is alleged, and must in all cases be brought within two years from the time of the solemnization of the marriage.[97]

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[92] C. L. 1915, (11422); Howell, 2nd. Ed., §11483; People v. Slack, 15 Mich. 201.

[93] C. L. 1915, (11423); Howell, 2nd. Ed., §11484.

[94] C. L. 1915, (11424); Howell, 2nd. Ed. §11485.

[95] C. L. 1915, (11425); Howell, 2nd. Ed., §11486; Leavitt v. Leavitt, 13 Mich. 457; Sissung v. Sissung, 65 Mich. 179, 31 N. W. R. 770.

[96] C. L. 1915, (11426); Howell, 2nd. Ed., §11487.

### §366. Admissions and Confessions—Testimony of Parties.

No decree of divorce can be granted upon the declarations, admissions or confessions of the parties alone, and in all cases the court must require other evidence of the facts alleged in the bill, but either may, if he or she elects, testify in relation to such facts; but the testimony of either party to the action can be taken only in open court, and the testimony of the parties cannot be received in support or in defense of a charge of adultery.[98] Decrees of divorce by consent will not be entered, either in the circuit or Supreme Court. The court must look into the testimony and be satisfied that a legal cause for divorce exists.[99]

This statute refers to confessions and admissions, not to the testimony of a party as a witness. The circuit court has authority to require the defendant in a divorce case to testify.[1] If the testimony is clear and undisputed a decree of divorce may be granted upon the evidence of a complainant alone, but when the court is compelled to rest a decree upon the testimony of the complainant it will only grant relief when the case is very clearly established. There is no arbitrary fixed rule which prevents granting a decree upon the testimony of the complainant alone, if the testimony of such complainant is of such a character as to satisfy the conscience of the court that the cause for divorce alleged in the bill is established.[2]

### §367. Court may Deny Relief in Certain Cases of Adultery.

"In any suit brought for divorce on the ground of adultery, although the fact of adultery be established, the court may deny a divorce in the following cases:

*First,* when the offense shall appear to have been committed by the procurement or with the connivance of the complainant:

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[97] C. L. 1915, (11427); Howell, 2nd. Ed., §11488.

[98] C. L. 1915, (11428); Howell, 2nd Ed. §11489; Sawyer v. Sawyer, Wal. Ch. 52.

[99] Robinson v. Robinson, 16 Mich. 79; Emmons v. Emmons, Wal. Ch. 532; Leavitt v. Leavitt, 13 Mich. 452; Dawson v. Dawson, 18 Mich. 335.

[1] Rosecrance v. Rosecrance, 127 Mich. 322, 86 N. W. R. 800.

[2] Murphy v. Murphy, 150 Mich. 97, 113 N. W. R. 583; Rosecrance v. Rosecrance, 12 Mich. 322; 86 N. W. R. 800.

*Second,* when the offense charged shall have been forgiven by the injured party, and such forgiveness be proved by express proof, or by the voluntary cohabitation of the parties with knowledge of the offense;

*Third,* when there shall have been no express forgiveness, and no voluntary cohabitation of the parties, but the suit shall not have been brought within five years after the discovery by the complainant of the offense charged."[3]

Where the offense of adultery is committed by a husband or wife by the procurement or connivance of the other spouse, no divorce ought to be granted. A plaintiff in a divorce case, who by procurement or connivance has caused the defendant to commit the offense, cannot be said to come before the court with clean hands. The equitable maxim that one who seeks relief from a court of equity must come before the court with clean hands is as applicable to divorce cases as any other. Divorce laws are enacted for the relief of the innocent, not the guilty.[4]

## §368. Forgiveness and Condonation.

It is a rule of general application that forgiveness by the injured party of an offense which otherwise would constitute legal ground for divorce, will condone such offense, and such condonation may be either express, or implied from the acts and conduct of the parties.

By a reconciliation of the parties and the resumption of marriage relations after the offense is committed, the acts relied on in the bill may be treated as condoned. Condonation may be defined as a parelon or forgiveness of a past wrong or fault which has occasioned a breach of some duty or obligation. It is not an absolute term which can be applied alike to all cases and all circumstances. Its application will vary as the offense said to have been condoned may vary. If the offense be adultery, then knowledge of the fact, followed by cohabitation, is of itself condonation.[5] Condonation is a forgiveness, under a condition, express or implied, that the offense condoned shall not be repeated, and is founded upon full knowledge of all antecedent guilt. The term necessarily includes that operation of the mind, evinced by words or acts, known as forgiveness. Such forgiveness must be free, full and voluntary.[6]

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[3] C. L. 1915, (11429); Howell, 2nd. Ed. §11490.

[4] Hoff v. Hoff, 48 Mich. 281, 12 N. W. R. 160; Root v. Root, 164 Mich. 638, 130 N. W. R. 194.

[5] 8 Cyc. p. 559; McClanahan v. McClanahan, 104 Tenn. 217-228, 56 S. W. R. 858.

## §369. Support when Divorce from Bed and Board Denied.

The statute provides that "in case of an application for a divorce from bed and board, although a decree for such divorce be not made, the court may make such order or decree for the support and maintenance of the wife and children, or any of them, by the husband, or out of his property, as the nature of the case may render suitable and proper."[7]

A decree for the support of a wife and children, separate and away from the home of the husband and father, should not be made unless imperative reasons therefor are shown by clear and convincing proof. A permanent separation where there are young children cannot fail to be injurious to such children, for whom a home ought to be provided; and obviously the proper home for such children is the one where their parents reside. The court in such cases will have a greater regard for, and look more closely to, the interests and welfare of young children than that of the parents.[8]

## §370. Divorce from Bed and Board Revoked.

A decree of divorce from bed and board forever or for a limited time may be revoked under such regulations and restrictions as the court may impose. Such revocation can be made only upon the joint application of the parties, and their producing satisfactory evidence of their reconciliation.[9]

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[6] 8 Cyc. page 560; Ellis v. Ellis, 9 Atl. R. 884-887; Delliber v. Delliber, 9 Conn. 234; Johnson v. Johnson, 14 Wend. 637; Condonation is inferred from the fact of sexual intercourse after knowledge of the guilt of the offending; Graham v. Graham, 50 N. J. Eq. 701-706, 25 Atl. R. 358; Phillips v. Phillips, 25 Wis. 252; Burr v. Burr, 10 Paige (N. Y.) 20; Crichton v. Crichton, 73 Wis. 59-64, 40 N. W. R. 638; Odom v. Odom, 36 Ga. 286; Eggerth v. Eggerth, 15 Oreg. 626-628, 16 Pac. R. 650; Sullivan v. Sullivan, 34 Ind. 368-369; Andrews v. Andrews, 120 Cal. 184-189, 52 Pac. R. 298; Sharp v. Sharp, 116 Ill. 509, 6 N. E. R. 15; Farnham v. Farnham, 73 Ill. 497-500; Davis v. Davis, 19 Ill. 334; Pain v. Pain, 37 Mo. App. 110; Heist v. Heist, 48 Neb. 794, 67 N. W. R. 790; Burr v. Burr, 10 Paige (N. Y.), 20-24; Owens v. Owens, 96 Va. 191-195, 31 S. E. R. 72; Bavin v. Bavin, 27 Ont. 571-581.

[7] C. L. 1915, (11430); Howell, 2nd Ed. §11491; Where a wife obtains a decree for separate maintenance from her husband and a monthly allowance for that purpose, such monthly allowance should cease with his death, and she be left to her interests in his estate according to law; Wagner v. Wagner, 132 Mich. 343, 93 N. W. R. 889.

[8] Davidson v. Davidson, 47 Mich. 151; 10 N. W. R. 179; C. L. '97, (8655), Howell 2nd. Ed., §11492.

In the case of an application by the parties to revoke such a decree, the evidence of reconciliation should be so cogent and convincing as to satisfy the court that the application is made in good faith and that no doubt exists that the reconciliation is genuine. If the showing made leads the court to believe that there is a probability that the difficulties and differences between the parties, and the causes which produced the separation, will be renewed, the application ought to be denied. One settlement of matrimonial difficulties between the same parties ought to be sufficient, and an adjudication of that character ought not to be disturbed without clear and convincing proof.

## §371. Special Question to be Asked of Witnesses.

In all actions for divorce, if any of the testimony in the case is taken before a circuit court commissioner, or by stipulation or order of the court before any other officer, it is the duty of the commissioner or other officer to ask each and every witness sworn by and before him in such action the following questions:—"Do you know of any fact, matter, or circumstance, which will in any way tend to weaken complainant's case for divorce? If so state the same particularly and fully." This question must be reduced to writing by the commissioner or other officer who takes the testimony, and the answer of the witness to such question must also be reduced to writing, *verbatim* as far as possible and the question and answer returned to the court with the other testimony in the case.[9]

The neglect or refusal of the commissioner or other officer to comply with the provisions of this act would undoubtedly justify the court in denying the application for a divorce; but in a proper case the court might in its discretion direct the defect to be supplied by the commissioner or other officer, and require the witnesses to appear again and answer such question.

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[9] C. L. 1915, (11432); Howell, 2nd Ed. §11493.

## §372. Bill of Complaint to Allege Names and Ages of Children.—Service of Summons on Prosecutor.

Every bill of complaint filed for divorce, either absolute or limited, must set forth the names and ages of all of the children of the marriage, and, when there are children under fourteen years of age, a copy of the chancery summons issued in the cause must be served upon the prosecuting attorney of the county where the action is commenced. It then becomes the duty of the prosecuting attorney to enter his appearance in the cause, and when, in his judgment, the interests of the children or the public good so requires, he must appear at the hearing, introduce evidence, and oppose the granting of a decree of divorce.

Also, in any case where there are no children of the marriage under fourteen years of age, if it appears to the court that the public good so requires, an order may be entered requiring the prosecuting attorney to appear and oppose the granting of a decree of divorce.[10]

This section does not prevent prosecuting attorneys or their partners from acting as attorneys or counsellors for either party to the action. In case the prosecuting attorney is in any way interested as attorney or counsellor for either party, it becomes the duty of the court to appoint some respectable attorney to perform the services and duties of the prosecuting attorney.

The prosecuting attorney, or other attorney appointed by the court, is entitled to five dollars compensation for each case in which an investigation is made and an appearance entered. A practise seems to prevail in some of the circuit courts of this state, by which the prosecuting attorney, after receiving a copy of the summons, simply files a written report without entering an appearance and receiving a copy of the bill of complaint. Whatever may be the effect of such practice where a decree is granted it certainly does not comply with the statute. It is a well settled principle that the public good requires that there shall be no collusive divorces. Where bills are filed, or not defended, by reason of some understanding or agreement between the parties, not only does public policy forbid such divorces, but they are positively forbidden by legislative enactment.

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[10] C. L. 1915, (11433); Howell, 2nd. Ed., §11494.

In all cases where there are children of the marriage under fourteen years of age, a copy of the summons must be served on the prosecuting attorney. On receiving such summons, it is the positive duty of the prosecuting attorney to enter an appearance in the case. He is then entitled to a copy of the bill, and such copy must be served on him by complainant's attorney according to the rules and practice of the court. He should then examine the bill and investigate the case, and determine whether the interests of the children and the public good require that the application should be opposed, and report this determination to the court. The statute is mandatory in this respect, and it is for such services that he receives the compensation provided for therein.[11]

### §373. Remarriage may be Forbidden—Limit of Time—Penalty for Violation.

The court granting a decree of divorce may provide in such decree that the party against whom the decree is granted shall not marry again within such time as shall be fixed by the court, which time shall be set out in the decree. The court is not authorized to prohibit the remarriage of the complainant, and the prohibition against remarriage of the guilty party cannot be for a longer period than two years from the time the decree is granted. In case any person so prohibited shall marry within the time fixed by such decree, such person is deemed to have committed the crime of bigamy and is subject to the penalties provided by law for such crime.[12]

It has been held in this state that the court has no jurisdiction to punish a person for criminal contempt who violates the provision of this statute, and of a decree prohibiting him from marrying for a period expressed in the decree, by marrying again in a foreign jurisdiction within such period.[13]

Statutes imposing restrictions upon the remarriage of divorced persons are quite common, and in some jurisdictions are operative without the aid of an express prohibition in the decree of divorce. In Wisconsin the statute provides that it shall not be lawful for a divorced person to marry again within one year from the date of the decree of divorce. This prohibition is absolute, without the aid of an express provision in the decree to that effect. In this respect the Wisconsin statute differs from that of Michigan. In Michigan, if the decree is silent on the subject the statute has no force. In Wisconsin it is held that the statute declares a public policy which will prevent the recognition by the courts of that state of a marriage between its citizens who go to another state to evade the provisions of the statute, and return to their former domicile after the ceremony.[14]

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[11] Wilcox v. Circuit Judge, 83 Mich. 1, 47 N. W. R. 29.

[12] C. L. 1915, (11434); Howell, 2nd. Ed. §11495.

[13] In re Crane, 170 Mich. 651, 136 N. W. R. 587, McAlvay and Brook, JJ. dissenting.

There are other states whose laws provide that the guilty party, against whom a decree of divorce has been rendered, shall not remarry for a term of years, or for life, and such laws have generally been regarded merely as intended to fix and regulate the conduct of the divorced party within the state, and not as intended to follow him to another jurisdiction, and to prevent a marriage which would be lawful there; in other words they impose a penalty only local in its effect. Under this construction the remarriage of such guilty party in another state has generally been held valid, notwithstanding the prohibition of the local statute.[15]

Statutes prohibiting marriage after divorce do not operate extraterritorially unless made to do so by express words or necessary implication, as has been frequently held in this country.[16] It is generally considered, however, that the weight of American authority, as well as reason and analogy, sustain the proposition that a marriage in another state, where it is valid according to the laws of that state, of a divorced person incapable of remarrying by the law of his domicile, will not be held void under the law of his domicile unless the statute expressly so provides, although he went outside the state of his domicile for the express purpose of evading the law, and immediately returned.[17]

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[14] Lanhan v. Lanhan, 136 Wis. 360, 117 N. W. R. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. R. 1085.

[15] Lanham v. Lanham, 136 Wis. 360, 117 N. W. R. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. R. 1085; In re Crane, 17 Mich. 651, 136 N. W. R. 587; Frame v. Thormann, 102 Wis. 654, 79 N. W. R. 39; Van Voorhis v. Bainenall, 86 N. Y. 18, 40 Am. R. 505; State v. Shattuck,, 69 Vt. 403, 40 L. R. A. 428, 60 Am. St. R. 936, 38 Atl. R. 81.

[16] Pennegar v. State, 87 Tenn. 244, 2 L. R. A. 703, and cases cited.

[17] State v. Shattuck, 69 Vt. 403 L. R. A. 428.

## §374. Dower—Provision in Lieu of—Tenants by Entireties.

The legislature in 1909 enacted that "when any decree of divorce is hereafter granted in any of the courts of this state, it shall be the duty of the court granting such decree to include in it a provision in lieu of the dower of the wife in the property of the husband, and such provision shall be in full satisfaction of all claims that the wife may have in any property which the husband owns or may thereafter own, or in which he may have an interest."[18]

The same act also provides that "every husband and wife owning real estate as joint tenants or as tenants by entireties shall, upon being divorced, become tenants in common of such real estate, unless the ownership thereof is otherwise determined by the decree of divorce."[19]

In such cases, if the bill or any amendment thereto, or the answer or cross-bill, asks that the ownership of land described therein and owned by the parties as joint tenants, or as tenants by entireties, shall be determined by the decree of divorce if granted, the court granting the decree may award such lands to one or the other of said parties, or any part of it to either of them, or may order such lands to be sold under the direction of a circuit court commissioner and the proceeds thereof divided between the parties in such proportion as the court shall order. Or the court may appoint commissioners to partition such lands between the parties in the proportions fixed by the decree.[20]

Where a decree of divorce determines and fixes the ownership of real estate the decree should be recorded in the office of the register of deeds of the county in which such real estate is located.[21]

The interest of a wife in lands held by herself and husband as tenants by entireties cannot be diminished by a decree of divorce.[22]

## §375. Alimony—When Decree Rendered in Another State.

In all cases where a decree for alimony has been rendered by a court of competent jurisdiction in another state, in which the party against whom the decree was rendered appeared in the cause, or was personally served with process within the jurisdiction of the court, the alimony decreed upon final hearing may be recovered in this state in an action at law, regardless of whether such alimony is decreed to be paid in installments from time to time, or in one payment.

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[18] C. L. 1915, (11436); Howell, 2nd Ed. §11496.

[19] C. L. 1915,,(11437); Howell, 2nd. Ed., §11497.

[20] C. L. 1915, (11438); Howell, 2nd, Ed., §11498.

[21] C. L. 1915, (11439); Howell, 2nd. Ed., §11499.

[22] Delor v. Delor, 159 Mich. 624, 124 N. W. R. 540; Brown v. Brown, 144 Mich. 654, 108 N. W. R. 288; Brasch v. Brasch, 168 Mich. 459, 134 N. W. R. 450.

When an action at law is brought in this state to recover alimony decreed in another state, the defendant in such action may show that he has made a proper application to the court of the other state in which such decree was granted, for a reduction of the amount decreed, or any further order in relation thereto, and thereupon the court in which such action is pending in this state may stay the proceedings therein on such terms as it may desire to impose. In cases where a judgment is rendered in any such action, all proceedings thereafter are stayed for the period of sixty days, and if during such term the defendant in such action in this state presents satisfactory evidence of a change in the decree of the courts of the other state, the judgment in this state may be altered or amended in such way as shall seem proper and just to the court.[23]

## §376. Restoring Former Name to Wife.

In all cases where a decree of divorce is granted, and there are no minor children, the issue of the marriage, the court, on the application of the wife, may make a decree to restore to her her maiden name, or the name she legally bore prior to her marriage to the husband in the divorce suit, or allow her to adopt another name.[24] The request for a change of her name may be made by the wife in her bill, answer, or cross-bill as the case may be, and the name which she desires to assume in case a decree of divorce is granted should be stated.

## §377. Right of Husband to Alimony out of Wife's Property.

In what has been said so far on the subject of alimony, reference has been made only to the Michigan statutes. Without statutory authority courts have no jurisdiction to award alimony to a husband out of his wife's property.

In Michigan neither the written nor the unwritten law justifies adjudging alimony to a former husband out of his divorced wife's property or earnings, no matter how great the necessities of the husband or the ability of the wife. It may be said in passing, however, that we are speaking of alimony strictly so-called, and not of division of property.

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[23] C. L. 1915, (11440); Howell, 2nd. Ed., §11500, 11501, 11502.

[24] C. L. 1915, (11435); Howell, 2nd. Ed., §11503.

As said by a standard text-writer "No instance could occur at common law in which the court would decree alimony to the husband; and in the absence of any statute creating such liability, the wife would not be liable to an action for alimony, although she is enabled by statute to hold and transfer real and personal property in her own name and right."[25]

True, the commentator suggests that, under a system permitting a husband's property to be transferred to the wife, equitable considerations would seem to justify burdening the same with alimony in favor of the husband, but that is a matter exclusively for the law-making power to deal with. In a Kansas case the court observed that there is no judicial authority for giving the husband alimony. "The domestic relations will have to be readjusted by the legislature, and an obligation cast upon the wife to support the husband before such an action can be maintained,"[26] said the Court, speaking evidently of an obligation to so support after a decree of permanent separation. It must be remembered in this connection that permanent alimony, alimony after the dissolution of the marriage contract, is wholly a creation of written law. It was not known to the common law or to ecclesiastical law. One is liable to fall into some confusion in studying this subject, as perhaps some text writers have done, if he does not keep in mind the principles above alluded to, upon reading here and there in elementary works that alimony may be granted to a husband in a divorce proceeding, and referring without further comment to cases which were decided in accordance with plain statutory provisions allowing such award.

While no statutory provision has been made in Michigan and many of the other states, allowing an award to a former husband out of his divorced wife's property, such provisions have been made by legislative enactment in other states. In Massachusetts the statute provides that "when a divorce is decreed for any of the causes mentioned in sections seven and ten, the court granting it may decree alimony to the wife, or any share of her estate in the nature of alimony to the husband."[27] A somewhat similar provision is made in Iowa,[28] Rhode Island, North Carolina, Washington, Oregon, and perhaps in other states.

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[25] 2 Nelson, Div. and Sep. §904.

[26] Somers v. Somers, 39 Kan. 132, 17 Pac. R. 841.

In Masachusetts the statute authorizes the court to award a share of the wife's estate in the nature of alimony to the husband upon a decree of divorce from the bonds of matrimony, absolutely and finally severing the marriage tie; but in the case of a divorce *nisi*, which is in the nature of a divorce *from* bed and board, not absolutely dissolving the bonds of matrimony between the parties, no provision for alimony is made by the statute authorizing such divorce.[29]

In an Iowa case, a farm purchased with money given to a wife by her father was decreed to her, but was charged with an allowance of seventy-five dollars a year to the husband. The appellate court held that the husband had no right to complain of the allowance made, in view of the fact that the farm came to him from his wife, although it appeared that he was not at fault.[30]

Where the statute authorizes the court to decree alimony to the husband, it has been held to be error to do so when it appears that he is at fault and is amply able to provide for himself.[31]

But in a later Iowa case it was held that the fact that the husband is at fault does not necessarily bar his right to alimony, and that in a proper case the court may award it.[32]

In Oregon a statute authorizes the court in an action for divorce to allow an amount against the party at fault for the maintenance of the other. Under this statute it is held that alimony may be awarded to the husband in a proper case.[33]

In England it is provided by act of Parliament that if an adulterous wife shall be entitled to any property in possession or reversion, the courts shall have power to settle a reasonable part of it for the benefit of the innocent party. This statute has been held to authorize a settlement for the benefit of an innocent husband, and therefore the court may award an annual allowance for him.[34]

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[27] General Stat. Mass., Ch. 107 §44; Garnett v. Garnett, 114 Mass. 347.

[28] Iowa Code, 1873, §2226; Small v. Small, 42 Iowa 111; Barnes v. Barnes, 59 Iowa 456; 13 N. W. R. 441.

[29] Garnett v. Garnett, 114 Mass. 347.

[30] Casey v. Casey, 116 Iowa 655, 88 N. W. R. 937.

[31] Barnes v. Barnes, 59 Iowa 456, 13 N. W. R. 441.

[32] McDonald v. McDonald, 117 Iowa 307, 90 N. W. R. 603.

[33] Henderson v. Henderson, 37 Ore. 147, 60 Pac. R. 597, 61 Pac. R. 136, 48 L. R. A. 766, 82 Am. St. R. 741, Huffman v. Huffman, 47 Ore. 616, 86 Pac. R. 593, 114 Am. St. R. 943.

In a Canadian case a weekly allowance was granted to the husband upon the granting of a decree of divorce where it [illegible] that the husband's means of support were taken away by the divorce. It does not appear from the report whether or not the allowance was made under the authority of a statute.[35]

In a California case the court said: "Alimony in its strict legal sense proceeds only from the husband to the wife, and the legislature in speaking of that term meant it only in that sense." [36]

In a later California case it was held that a wife might be compelled to pay toward the support of her husband under the provisions of a statute compelling her to support him out of her separate property.[37]

It may be stated, however, that the power of the court to make such an order should not be confused with the power to grant alimony. The right given by the statute for support in such a case is independent of divorce proceedings, and an allowance may be decreed although no divorce is asked, and if an allowance is granted the failure to comply with the order may be punished as a contempt.

Alimony, in its strict legal sense, is such sum as is ordered by the court to be paid by a husband to his wife for her support, during the time she lives separate and apart from him. The right to such alimony originated in the common law liability of the husband to support his wife. Alimony required to be paid by the husband to the wife, after the dissolution of the marriage tie, is a creation of modern law, and is what is known as permanent alimony.[38]

Alimony is allowed the wife in recognition of the husband's common law obligation to support her; therefore, in the absence of legislation readjusting domestic relations and allowing it, there being no corresponding liability on the part of the wife to support her husband, alimony cannot be awarded to him out of his wife's property. Yet legislation in several of the states is setting quite strongly in a direction to ultimately exhibit the spectacle of rich wives supporting poor husbands. and husbands defrauding their creditors while wealth embraces them in the arms of their wives.

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[34] 20 and 21 Vict. Ch. 85; March v. March, L. R. 1 P. & D. 440; Milne v. Milne, L. R. 2 P. & D. 295.

[35] Joly v. Garnaeu, 5 Quebec Pr. 137.

[36] In re Spencer 83 Cal. 460, 23 Pac. R. 395, 17 Am. St. R. 266.

[37] Livingston v. Superior Court, 117 Cal. 633, 49 Pac. R. 836, 38 L. R. A. 175.

[38] 2 Bishop Mar. & Div. §351.

# CHAPTER XXXII.

## GENERAL STATUTORY PROVISIONS CONCERNING HUSBAND AND WIFE.

§378. Abandonment of Wife by Husband.
§379. Married Woman Coming from Another State or Country Without Her Husband.
§380. Divorce from Bed and Board.—Effect of on Wife's Property and Obligations.
§381. Rights of Married Woman in Relation to Property Owned by Her.
§382. Alimony Where Wife is Deserted or Neglected by Husband.
§383. When Husband May be Required to Support Wife.
§384. Proceedings and Practice.
§385. Care and Custody of Children—Allowance May be Changed.
§386. Custody of Children When Husband and Wife Separate.
§387. Legal Impediment to Marriage as Bar to Actions for Damages.
§388. Punishment of Husband for Desertion.
§389. Certain Wife Desertion—Felony—Limitations.

### §378. Abandonment of Wife by Husband.

"When any married man shall absent himself from the state, abandoning his wife, and not making sufficient provision for her maintenance, if the wife is of the age of twenty-one years, the Probate Court of the County in which she resides may, on her petition, authorize her to sell and convey, or lease her real estate, or any part thereof, and also to sell and dispose of any personal estate which shall, at any time, have come to the husband, or to which he may be entitled, by reason of the marriage, and which may remain in this state undisposed of.[1]

This section, as well as several of the other statutory provisions mentioned in this Chapter, were enacted before the passage of the married woman's act of 1855, and before the adoption of the constitution of 1850, and are contained in Chapter eighty-five of the Revised Statutes of 1846, and also appear in practically the same form in every compilation of the statutes since that time.[2] The adoption of the constitution of 1850, and the passage of the married woman's act of 1855. while not expressly repealing Chapter 85 of the revised statutes of 1846, practically makes many of the provisions of that chapter obsolete. But even after the lapse of so many years since the constitution of 1850 went into effect, cases may arise where property rights dependent upon or regulated by those early laws come in question.

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[1] C. L. 1915, (11451); Howell, 2nd Ed. §11504.

It would seem, however, that at the present time there can be no occasion for a married woman, whose husband has deserted and abandoned her without making sufficient provision for her maintenance, to apply to the Probate Court of the county, where she resides, for the relief which Chapter 85 of the Revised Statutes of 1846 provides.

The provisions referred to and the authority of the Probate Court to grant such relief only extend to such real estate as is owned by the wife, and to such personal estate as shall have at any time come to the husband, or to which he may be entitled, *by reason of the marriage.*

But since 1855, all of the real and personal estate of every woman, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled in any way, is her own estate and property, to do with as she pleases, and may be disposed of by her in the same manner, and with the like effect as if she were unmarried; consequently there can be no occasion or reason whatever for her to make an application to the Probate Court for authority to do that which she already has competent legal authority to do. The first nineteen sections of Chapter 85 of the Revised Statutes of 1846, for the reasons before stated, appear to be obsolete if not repealed by implication, by subsequent enactment. Some of the provisions of that chapter, however, are still in force.

## §379. Married Woman Coming From Another State or Country Without Her Husband.

Section 20 of Chapter 85 of the Revised Statutes of 1946 provides that: "When any married woman shall come from any other state or county in this state, without her husband, she may transact business, make contracts, and commence, prosecute and defend suits in her own name, and dispose of her property which may be found in this state, or which she may acquire, in like manner, in all respects, as if she were unmarried."[3]

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[2] Revised Statutes, 1846, Ch. 85, C. L. 1857, Ch. 109, §§ 1 to 27 inclusive, C. L. 1871, Ch. 233, §§ 1 to 27 inclusive; Howell's Annotated Statutes, 1st Ed. §§ 6264 to 6290 inclusive; Howell's 2nd Ed. §§ 11504 to 11530 inclusive; C. L. 1915, (11451) to (11481).

The next section provides that: "Such married woman shall be liable to be sued as if she were unmarried, upon all contracts, and for all other acts, made or done by her after her arrival in this state; and she may make and execute any deeds and other instruments, in her own name, and do all other lawful acts, that may be necessary and proper to carry into effect the powers herein granted to her."[4]

The next section provides that: "If the husband of any such woman shall afterwards come into this state, and claim his marital rights, his arrival here shall have the same effect, with regard to any suit then pending, in which she is a party, and to any contract made, or business transacted by her under the power granted to her by the provisions of this chapter, as if they had been just married at the time of his arrival here, and shall have no other effect.[5]

There appears to be no reported case in which the provisions of this statute have been construed, or passed upon by the Supreme Court of this State. Nor have the provisions of these sections been repealed by express enactment, or by necessary implication from subsequent enactment inconsistent therewith.

Whether this statute would apply to a case where a wife came to this state from another state or country, without her husband, but with his knowledge and consent, and for a visit or some other temporary object, may admit of some doubt. It would seem, however, that a fair construction of the statute would confine its application to cases in which the wife came into this state for some permanent purpose and without the consent or approval of her husband, from the fact that the husband may at any time put an end to the power of the wife to do the things mentioned in the statute by coming into the state and claiming his marital rights. And in order for the wife to become possessed of the rights and be subjected to the obligations mentioned, she must have never resided in this state with her husband.

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[3] C. L. 1915, (11470); Howell, 2nd Ed. §11523.

[4] C. L. 1915, (11471); Howell, 2nd Ed. §11524.

[5] C. L. 1915, (11472); Howell, 2nd Ed. §11525.

## §380. Divorce From Bed and Board.—Effect of on Wife's Property and Obligations.

Section twenty-four of Chapter 85 of the Revised Statutes of 1846, also provides that: "Upon a divorce from bed and board, the wife shall have the same powers and rights in respect to her real and personal estate, and such as she may afterwards acquire, and shall be subject to the same liabilities in all respects as an unmarried woman, and may sue and be sued in her own name in like manner.[6]

This section has never been expressly repealed, and its language seems to be broad enough to invest a married woman who has been legally separated from her husband by a decree of divorce from bed and board, with all of the rights, and to subject her to all of the obligations of an unmarried woman, except the right to contract another marriage.

## §381. Rights of Married Woman in Relation to Property Owned by Her.

In 1844[7] the legislature of this state enacted that: "Any real or personal estate which may have been acquired by any female (we prefer to say woman), before her marriage, either by her own personal industry, or by inheritance, gift, grant, or devise, or to which she may at any time after her marriage be entitled by inheritance, gift, grant, or devise, and the rents, profits and income of any such real estate, shall be and continue the real and personal estate of such female after marriage, to the same extent as before marriage; and none of said property shall be liable for her husband's debts, engagements or liabilities; but such property shall be liable for all debts of the wife contracted prior to her said marriage." By the revision of 1846, two provisions were added as follows: *"Provided*, That nothing in this section contained shall be construed to authorize any married woman to give, grant, or sell any such real or personal property during coverture, without the consent of her husband, except by order of the Judge of Probate, or the proper court of the county: *And provided further*, That upon a separation between such husband and wife, saving by an adjudication of court such married woman shall in no case be authorized to remove any such property from the premises of her husband without his consent."[8]

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[6] C. L. 1915, (11474); Howell, 2nd Ed. §11527.

[7] P. A. 1844, page 77.

[8] C. L. 1915, (11475); Howell, 2nd Ed. §11528.

The Act of 1844 took away all present rights of the husband to the property of the wife, both real and personal, and to the rents and profits thereof. But it did not interfere with his common law right to the custody and control of her person and to her earnings, nor did it expressly vest her with power to dispose of the property without his co-operation. Nor did this section as modified by the Revised Statutes of 1846, as above stated, give the wife power to dispose of her property, or the rents and profits thereof, or to remove the same from the premises of her husband without his consent or an order of a court of competent jurisdiction. But the constitution of 1850,[9] enlarged her powers with respect to the disposition of her estate; and the Married Woman's Act of 1855, entirely abrogated the husband's control over her property and vested her with the full power of its control and disposition, and superseded sections twenty-five, twenty-six and twenty-seven of chapter eighty-five of the Revised Statutes of 1846.[10]

### §382. Alimony Where Wife is Deserted or Neglected by Husband.

The statutes of this state make provision for alimony for the support and maintenance of a wife whose husband has deserted and abandoned her without sufficient cause, without a decree of divorce, either limited or absolute.

In 1873 an act was passed entitled "An act to provide wives with property and maintenance from their husbands' estate when neglected or deserted by them." [11]

Sections 1 and 2 of this act seem to have been superseded by an act passed in 1889 entitled "An act to provide wives with property and maintenance from their husbands' estates when neglected or deserted by them, or when the husband has become an habitual drunkard, or has practiced extreme cruelty towards his wife or committed any offense sufficient to entitle the wife to a decree of divorce or separation." [12] This act supersedes sections 1 and 2 of the act of 1873, but does not repeal or supersede section 3 of that act. The exercise of the authority conferred by the act of 1889 (Howell's 2nd Ed. 11534), is not inconsistent with section 3 of the act of 1873, and consequently that section is still in force.[13]

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[9] Const. 1850, Art. 16, Sec. 5.

[10] Tong v. Marvin, 15 Mich. 60; Hill v. Chambers, 30 Mich. 422; Brown v. Clark, 44 Mich. 309, 6 N. W. R. 679; Ransom v. Ransom, 30 Mich. 329.

[11] C. L. 1915, (11482); see note; Howell, 2nd Ed. §11531.

[12] C. L. 1915, (11479); Howell, 2nd Ed. §11534.

## §383. When Husband May be Required to Support Wife.

The statute now in force on this subject provides that: "Whenever a husband shall, without good and sufficient cause, desert his wife, or shall have hereafter deserted his wife without good and sufficient cause, being of sufficient ability to support her, or shall have become an habitual drunkard since the marriage, or practised extreme cruelty towards her, or committed the crime of adultery, or any other offense that entitles the wife to a decree of divorce or separation, and shall refuse and neglect to support his wife, either the wife or husband being a resident of this state, the Circuit Court in Chancery of any county in this State in which said husband or wife shall reside, shall, on application of the wife by petition, allot, assign, set apart and decree to her as alimony the use of such part of the husband's real and personal estate, or such proportion of his earnings, income or revenue as the court may determine, in its discretion, and during the pending of the proceedings may require the husband to pay such sums to carry on the proceedings, or for her support, as it shall deem necessary, in like manner as provided by section six thousand two hundred and thirty-five of Howell's Statutes, being four thousand seven hundred and forty-five of the compiled laws of eighteen hundred and seventy-one, in case of suit for divorce: *Provided*, That no decree shall be made in favor of the petitioner unless on the hearing, either such a state of facts shall appear as would entitle her, as far as the husband's wrongful acts are shown, to a decree for divorce upon the grounds specified in the petition, or unless such a state of facts set out in the petition shall be proven as shall make it appear that the respondent has deserted the petitioner with intent to leave her without good and sufficient cause, and the husband shall be permitted to allege in his answer to the petition any facts which would prevent or bar a divorce upon the grounds alleged in said petition and to make proof of the same in conformity with such answer. And, *provided*, further, that an appeal from the final order or decree may be taken to the Supreme Court as in Chancery cases, except that if the wife shall take such appeal she shall not, in the discretion of the court, be required to file an appeal bond."[14]

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[13] Tobey v. Tobey, 100 Mich. 54, 58 N. W. R. 629.

## §384. Proceedings and Practice.

Whenever a petition is filed in such proceedings, a chancery summons may be issued, served and returned as in ordinary chancery cases, and if upon the filing of the petition, or the return of the summons unserved, it shall be made to appear that the husband has left, or is out of the state, or has concealed himself so that service of process is impossible, the court may make an order for his appearance to be published for the same time and in the same manner as the statute provides in chancery suits generally.

If upon filing such petition, it shall be made to appear to the Circuit Judge that the husband has property, real or personal, credits, stocks, or securities, which there is good reason to believe he will dispose of to avoid the decree of the court, the court may grant an injunction restraining the sale and incumbrance of such property, stocks and securities and the collection of such credits, and notice of such injunction served upon any person who is the agent of the husband or his debtor, or the secretary of any corporation in which he holds stock, or upon the register of deeds, shall enjoin them from taking any part in aiding the transfer or incumbrance of such property and from the payment of such debts, and be notice to any and all persons to whose knowledge it shall be brought, and operate as an attachment of property in the hands of that person, but such injunction shall not be held to affect the duty of the register of deeds to record any deed or other instrument, properly executed, delivered to him for that purpose.

To enforce its decree the court may cause execution to be issud and levied upon any of the husband's estate found in the state, including stock in any corporation. Where choses in action are due and owing to the husband from any resident of this state the court may, upon thirty days' notice given to the defendant personally, if he is a resident, and by publication if he is concealed or a non-resident, once in each week for said thirty days in some newspaper published in the county in which such action is pending, order, decree and direct that the same be sold in the same manner as personal chattels are sold upon execution from courts of record.[15]

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[14] C. L. 1915, (11479); Howell, 2nd Ed. §11534. Section 6235 of Howell's Statutes above referred to is Section 8626 of the Compiled Sec. of 1897, and Section 11465, Howell's Statutes 2nd Edition.

### §385. Care and Custody of Children.—Allowance May be Changed.

In all proceedings brought pursuant to the statutory provisions referred to in the two preceding sections, the court may order and decree concerning the care, custody and maintenance of the minor children of the parties, and may determine with which of the parties the children, or any of them, shall remain, and during the pendency of the proceedings, may assign and decree to the wife the possession of any of the real and personal estate of the husband, and the court may decree the payment of a fixed sum of money for the support of the wife and minor children, and may provide that the payment of the same be secured upon real estate, or otherwise, at such times and in such manner as may be proper, and may enforce the performance of such decree by the sale of the real estate of the husband, or otherwise, as may be necessary.

The court has power at all times to change the allowance made, from time to time, according to the circumstances, and may revoke such allowance altogether on satisfactory proof of a voluntary and permanent reconciliation. The allowance made under these provisions can continue only during the joint lives of the parties.[16]

A petition or bill for the support of a wife separate from her husband will only be sustained when the reasons for it are imperative. If the court is satisfied that the difficulties between the parties are not serious, or that there is a reason to believe that such difficulties may be adjusted, and the parties be reconciled, the bill should be dismissed.

Especially is this true when there are young children for whom the parties ought to provide a home.[17]

A proceeding of this character must be based upon a valid marriage between the parties to the suit, and such marriage must be proven the same as in an action for divorce.[18]

Eighteen years delay in suing a husband for support where the wife is living apart from him is fatal to the suit even if the wife left him for good and sufficient cause.[19]

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[15] C. L. 1915, (11480); Howell, 2nd Ed. §11535.

[16] C. L. 1915, (11483); Howell, 2nd Ed. §11533.

[17] Davidson v. Davidson, 47 Mich. 151, 10 N. W. R. 179.

[18] Clancy v. Clancy, 66 Mich. 202, 33 N. W. R. 889.

### §386. Custody of Children When Husband and Wife Separate.

Where a husband and wife, having minor children separate, the statute provides that the mother shall be entitled to the care and custody of all such children under the age of twelve years, and the father shall be entitled to the care and custody of all such children of the age of twelve years or over. In such case, however, the Probate Court or any court of competent jurisdiction may, on a proper application and hearing, make and enforce such order or orders as it may deem just and proper as to the care and custody of such minor children, except in cases where an order or decree may have been made by any court in chancery regarding such children.[20]

This statute will not be construed as fixing an absolute right to the care and custody of the children in either parent. It simply fixes a rule, directory only, providing which parent may be given the care and custody of children of certain ages, where no reason is made to appear for a different determination. The paramount consideration is, what is really demanded for the best interests of the children.

Neither of the parents has any right to the custody of a child, if such custody would seriously militate against its welfare. The court may in its discretion commit the custody of the child or children to either parent.[21]

### §387. Legal Impediment to Marriage as Bar to Actions for Damages.

Prior to 1905, a wife who sought to recover damages for negligent injuries to her husband or a husband who sought to recover damages for negligent injuries to his wife must show a legal marriage and the legal relation of husband and wife in order to maintain such action for damages.[22]

In 1905, the legislature passed an act entitled "An act extending the right of action for damages heretofore or hereafter sustained through the negligent act or omission of another, causing death or injury to the issue of the marriage relation and to the party thereto entering such relation in good faith, and providing damages for such act or omission."

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[19] Reed v. Reed, 52 Mich. 117, 17 N. W. R. 720. A valid marriage and the relation of husband and wife are prerequisites to such proceedings. Judson v. Judson, 171 Mich. 190, 137 N. W. R. 163.

[20] C. L. 1915, (11484); Howell, 2nd Ed. §11537.

[21] Corrie v. Corrie, 42 Mich. 509, 4 N. W. R. 213; Klein v. Klein, 47 Mich. 518, 11 N. W. R. 367; In re Knott, 162 Mich. 10, 126 N. W. R. 1040.

[22] Philip v. Heraty, 135 Mich. 446, 99 N. W. R. 963.

The text of this act provided that "in any action for damages heretofore or hereafter sustained by either party to the marriage relation or the issue thereof, arising from the negligent act or omission of another, causing death or injury, it shall be no bar to such action that legal impediment existed to the lawful marriage of either such party, at the time the marriage relation was assumed, but a right of action shall exist in favor of such issue and the party to such relation entering the same in good faith, and such issue and party shall be entitled to the same damages as though such impediment had not existed."[23] This act has been held unconstitutional, only so far as it relates to injury or death occurring prior to the time the act took effect.[24]

## §388. Punishment of Husband for Desertion.

A husband who deserts his wife, and any person who deserts his minor children, under fifteen years of age, and without providing proper shelter, food, care and clothing for them, is guilty of a felony, and upon conviction may be punished by imprisonment in the State Prison for not more than three years nor less than one year; or by imprisonment in the county jail not more than one year and not less than three months. If at any time before sentence the defendant shall enter into a bond to the people of the state of Michigan, in such penal sum and with such surety or sureties as the court may direct and fix, conditioned that he will furnish his wife and children with necessary and proper shelter, food, care and clothing, the court may suspend sentence. If such bond is given and the defendant fails to comply with its conditions he may be ordered to appear before the court and show cause, if any exists, why sentence should not be imposed, and the court may then pass sentence, or for good cause shown may modify the order and take a new bond or undertaking, and further suspend sentence.[25]

If a person is convicted under this act and sentenced to a term of imprisonment in either of the state prisons or in the Detroit House of Correction, the warden of the prison in which such person is confined, or the Superintendent of the Detroit House of Correction shall, at the end of each week during such term of imprisonment, pay over to the proper Superintendent of the Poor the sum of one dollar and fifty cents per week, if there be only a wife, and fifty cents per week additional for each minor child under the age of fifteen years, in lieu of any earnings of such person while an inmate of the State Prison or the Detroit House of Correction under such sentence. The sums so paid are to be expended by the Superintendent of the Poor for the care and support of the wife and children of such person, as the case may be.[26]

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[23] P. A. 1905, Act. No. 280, Howell, 2nd E. §11538; C. L. 1915, (——).

[24] Philip v. Heraty, 147 Mich. 473, 111 N. W. R. 93.

[25] 1907, No. 144, Howell, 2nd Ed. §11539; C. L. 1915, (11484).

On the hearing of any complaint under this statute the wife may testify against the husband without his consent, and she may make the complaint in the first instance, although the statute does not in express terms authorize her to do so. The general rule that one who is a competent witness and has knowledge of the facts may make complaint in a criminal case permits the wife to be the complaining witness in a prosecution against her husband, instituted under the provisions of this act.[27]

Abandonment or desertion as used in this act means to separate from, wrongfully, without intention to return and resume marital relations, and it is wilful abandonment or desertion without just cause which is the essence of the offense. That the husband is unable to provide for his family, that the wife is able to earn a living, or that her friends or relations will keep her from want will not constitute an excuse or defense of a wilful abandonment. Neither is the resulting burden to the public an element of the offense.[28]

This statute does not violate section 21 of article 5 of the Constitution, which provides that "No law shall embrace more than one object, which shall be expressed in its title."

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[26] 1907, No. 144, §2; Howell, 2nd. Ed. 11540; C. L. 1915, (——).

[27] People v. Stickle, 156 Mich. 558, 121 N. W. R. 497; State v. Giles, 101 Me. 349; State v. Woodmansee, 19 R. I. 651; State v. Newberry, 48 Mo. 429; People v. Sebring, 66 Mich. 705, 33 N. W. R. 808.

[28] People v. Stickle, 156 Mich. 557, 121 N. W. R. 497; People v. Malsch, 119 Mich. 112, 77 N. W. R. 638; Warner v. Warner, 54 Mich. 492, 20 N. W. R. 557; Place v. Place, 139 Mich. 509, 102 N. W. R. 996; Johnson v. Johnson, 125 Mich. 671, 85 N. W. R. 94; Rose v. Rose, 50 Mich. 92, 14 N. W. R. 711; Cox v. Cox, 35 Mich. 46.

The provision of section one of the act authorizing the court to suspend sentence confers no new power upon the courts, and it cannot be construed as giving to the court a pardoning power which belongs exclusively to the executive branch of state government. The power to suspend sentence and the power to grant reprieves and pardons are distinct and different in origin and nature."

The power of courts to suspend sentence has always been considered a judicial function. It was exercised long before the adoption of the first constitution of the state and has frequently been exercised since.[29]

### §389. Certain Wife Desertion—Felony—Limitations.

The statute also provides that "Any man or boy who marries a woman or girl for the purpose of escaping prosecution for rape, bastardy, or seduction, and shall afterwards desert her without good cause, shall be deemed guilty of a felony, and shall, upon conviction, be fined not more than one thousand dollars, or be imprisoned in the state prison for not more than three years: *Provided*, That no prosecution shall be brought under this act after five years from the date of the mariage." [30]

Neither this statute nor Act No. 144 of the Public Acts of 1907 are applicable to a desertion before the law took effect.[31]

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[29] Hawk. P. C. Ch. 51, §8; Bishop Crim Proc. (2nd ed.) Sec. 1124; 4 Blackstone, Chap. 31; Commonwealth v. Dowdigan, 115 Mass. 136; Weaver v. People; 33 Mich. 296; People v. Reilly, 53 Mich. 260, 18 N. W. R. 849; People ex. rel. Forsyth v. Court of Sessions, 1 41 N. Y. 288, in which it is said: "The suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it, and all civil disabilities, remain and become operative when judgment is rendered.

A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment and blots out of existence the guilt of the offender so that in the eye of the law he is as innocent as if he had never committed the offense. People v. Stickle, 156 Mich. 564, 121 N. W. R. 497.

[30] P. A. 1907, Act No. 284, Howell, 2nd Ed. §1154; C. L. 1915, (——).

[31] People v. Albright, 161 Mich. 400, 126 N. W. R. 432.

# PART FOUR.

# PLEADING AND PRACTICE.

## PART FOUR—PRACTICE AND PLEADING.

Chapter XXXIII. Suits for Divorce.
Chapter XXXIV. Bringing the Defendant into Court.
Chapter XXXV. Proceedings after Appearance of Defendant.
Chapter XXXVI. Proceedings after Issue Joined or Default Entered.
Chapter XXXVII. Other Interlocutory Proceedings.
Chapter XXXVIII. Motions and Affidavits.
Chapter XXXIX. Hearing and Decree.
Chapter XL. Powers and Duties of Prosecuting Attorneys in Divorce Cases.
Chapter XLI. Appeals to Supreme Court.

# CHAPTER XXXIII.

## SUITS FOR DIVORCE.

§390. Jurisdiction.
§391. The Bill of Complaint.
§392. Defendant's Domicile.
§393. Minor Children.
§394. Causes for Divorce—Adultery—Extreme Cruelty.
§395. Physical Incompetency.
§396. Sentence to Imprisonment—Desertion.
§397. Habitual Drunkenness—Divorce in Another State.
§398. Failure of the Husband to Support the Wife.
§399. General Form of the Bill.
§400. Verification of Bills for Divorce.
§401. Divorce Suits—How Commenced and Conducted.
§402. Suit to Annul Marriage—How Brought.
§403. Form of Bill to Annul Marriage.
§404. Suits to Affirm a Marriage.

### §390. Jurisdiction.

Suits for divorce must be commenced in the circuit court for the county where the parties or one of them resides. The statute provides that a divorce from the bonds of matrimony may be decreed by the circuit court of the county where the parties, or one of them, resides, or by the court of chancery, upon application by bill or petition of the aggrieved party.[1] It appears to be the universal practice to commence divorce suits in the court of chancery by bill of complaint.

### §391. The Bill of Complaint.

The bill of complaint should be addressed to the circuit court in chancery of the county where the suit is commenced. The names and places of residence of both plaintiff and defendant should be stated, so that the court may know from the allegations of the bill whether or not it has jurisdiction of the parties. The party applying for the divorce should be designated plaintiff, and the party against whom the application is made should be designated defendant.[2]

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[1] C. L. 1915, (11397); Howell, 2nd ed. §11458.

[2] C. L. 1915, (12352); Cummins & Beecher's Mich Judicature Act, §475.

The bill should also state the length of time the plaintiff has resided in the state. Unless the marriage was solemnized in this state, the plaintiff must have resided in the state one full year before commencing suit, and that fact must be stated in the bill. If the marriage was solemnized in this state, the bill must show that the plaintiff has resided in the state one year or more next preceding the time of filing the bill, or continuously since the marriage.

If the cause for divorce charged in the bill occurred out of the state, the bill must show that the plaintiff or defendant, one or both of them, have resided in this state for the period of two years immediately preceding the filing of the bill.[3]

### §392. Defendant's Domicile.

The bill should also state that the defendant was domiciled in this state at the time it was filed, or that he was domiciled in the state at the time the cause of action arose. If at the time of filing the bill the defendant has a domicile in another state or country, such domicile should be stated in the bill if known to the plaintiff.[4]

### §393. Minor Children.

If one or more minor children of the marriage are living at the time of filing the bill, such fact must be stated in the bill, and the name, age, and place of residence of each given. Although not absolutely necessary, it is proper and advisable to state in the bill in whose custody the minor children are.

If the plaintiff desires the custody and control of the minor children of the marriage it should be so stated in the bill.

### §394. Causes for Divorce—Adultery—Extreme Cruelty.

The grounds or causes for divorce, for which a decree is sought, should be clearly and concisely stated in the bill, and it must be for some cause provided for by the statute.

If the charge made by the plaintiff is extreme cruelty, it is not enough to state in the language of the statute that the defendant has been guilty of extreme cruelty toward the plaintiff. The bill should state the particular acts, conduct or language which it is claimed constitute cause for divorce, and, with reasonable particularity, the time and place of their occurrence.

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[3] C. L. 1915, (11400); Howell, 2nd ed. §11461.

[4] C. L. 1915, (11400); Howell, 2nd ed. §11461.

If the charge made is adultery, the bill should state the name of the person with whom the adultery is alleged to have been committed, if known, and the time when and the place where the act was committed.[5] The bill must also allege that the plaintiff has never been guilty of adultery.

In proceedings for divorce on the ground of adultery, inflexible adherence must be observed to the forms and practice prescribed for the attainment of justice in courts of equity.[6]

An allegation is sufficient that states that the defendant lives "in open and notorious adultery," naming the time, place, and name of the party with whom the adultery is alleged to have been committed.[7]

If the name of the person with whom the defendant is alleged to have committed the adultery is unknown to the plaintiff and cannot be ascertained, that fact should be stated in the bill, and the particular act complained of identified by such circumstances of time and place as will enable the defendant to know with reasonable certainty the particular act charged. An allegation supported by proof of a single act of adultery is sufficient, and the charge may be proved by circumstantial evidence.[8]

### §395. Physical Incompetency.

If the cause for divorce alleged in the bill is physical incompetency, it must be stated that the plaintiff did not know of such incompetency at the time of the marriage. The bill should also state the particular character of the alleged physical incompetency or impotency alleged; that the same still exists at the time of filing the bill; that it is incurable; and that it makes the defendant incapable of consummating the marriage by sexual intercourse.

### §396. Sentence to Imprisonment—Desertion.

A bill asking for a divorce on the ground that the defendant has been sentenced to imprisonment for three years or more should state the court which imposed the sentence, the length of time, and the prison, jail or house of correction to which the defendant was sentenced.

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[5] Dunn v. Dunn, 11 Mich. 284; Shoemaker v. Shoemaker, 20 Mich. 222; Bennett v. Bennett, 24 Mich. 482; Green v. Green, 26 Mich. 437; Randall v. Randall, 31 Mich. 194; Herrick v. Herrick, 31 Mich. 298.

[6] Green v. Green, 26 Mich. 440.

[7] Marble v. Marble, 36 Mich. 386.

[8] Marble v. Marble, 36 Mich. 386.

If the cause for which divorce is sought is desertion, it is not sufficient to allege simply that the defendant deserted the plaintiff at a particular time and place. The plaintiff must allege specifically that the desertion or abandonment was wilful and intentional; that it was without cause; that it was against the wish of the plaintiff; and that it has continued uninterruptedly for the period of two years or more next preceding the time of filing the bill.[9] In other words, the bill must show a total cessation of cohabitation for the period of two years or more, an intent on the part of the defendant to desert the plaintiff, and a separation against the will of the plaintiff; and that such separation was without cause.[10]

### §397. Habitual Drunkenness:—Divorce in Another State.

A bill which claims a decree of divorce on the ground that the defendant has become an habitual drunkard must show that he has become an habitual drunkard since the marriage. The statutory provision is that an absolute divorce may be granted "when the husband or wife has become an habitual drunkard."[11] In such case the plaintiff should allege specifically that the defendant has become an habitual drunkard since the marriage was solemnized, or if he was an habitual drunkard before the marriage, it must be shown that such fact was concealed from, or at least unknown to, the plaintiff at the time of the marriage.[12]

If the application is made on the ground that the defendant has obtained a divorce in another state or country, the bill must show that the plaintiff is a resident of this state, and also show the state or country and the court in which such divorce was granted.[13]

### §398. Failure of the Husband to Support the Wife.

The statute provides that a divorce from bed and board forever, or for a limited time, may be decreed "on the complaint of the wife, when the husband, being of sufficient ability to provide a suitable maintenance for his wife, shall grossly, or wantonly and cruelly, refuse or neglect to do so."[14] The next section of the statute provides that a divorce from the bonds of matrimony, or an absolute divorce, may be decreed for the same cause "whenever in the opinion of the court the circumstances of the case shall be such that it will be discreet and proper so to do; but no divorce from the bonds of matrimony for either of the causes mentioned in the preceding section shall be entered in any case where the same is not asked for by the plaintiff in the bill of complaint filed therein, or by the defendant in a cross-bill, unless the court hearing the evidence shall deem it for the best interest of the parties to grant a divorce from the bonds of matrimony, and in that event the court may grant such divorce."[15]

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[9] C. L. 1915, (11397); Howell, 2nd ed. §11458, Sub. 4; Warner v. Warner, 54 Mich. 492, 20 N. W. R. 557; Wright v. Wright, 80 Mich. 572, 45 N. W. R. 365.

[10] Rose v. Rose, 50 Mich. 92, 14 N. W. R. 711; Cooper v. Cooper, 17 Mich. 210; Porritt v. Porritt, 18 Mich. 424; Cox v. Cox, 35 Mich. 463; Beller v. Beller, 50 Mich. 51, 14 N. W. R. 696; Rudd v. Rudd, 33 Mich. 101.

[11] C. L. 1915, (11397); Howell, 2nd ed. §11458, Sup. 5.

[12] Porritt v. Porritt, 16 Mich. 441.

[13] C. L. 1915, (11397); Howell, 2nd ed. §11458, Sub. 6; People v. Dawell, 25 Mich. 254.

The bill in such a case should allege that the husband is of sufficient ability to support his wife and provide a suitable maintenance for her; and it should state such facts as to the pecuniary circumstances of the husband as will have a tendency to show such ability. It is sufficient if the bill alleges the neglect and refusal, in the language of the statute, but the ability of the husband should be shown by stating such facts as will enable the court to determine whether or not such ability exists, if the facts alleged are true.[16]

If the bill is filed for the purpose of procuring a divorce from bed and board, or limited divorce, the prayer of the bill should so state, and if a divorce from the bonds of matrimony is desired it should be expressly stated in the prayer for relief.[17]

## §399. General Form of the Bill.

In divorce cases the general frame or form of the bill, with a few exceptions, is the same as in other chancery cases.

The preparation and filing of the bill of complaint is the first step in the suit. The bill must be addressed to the circuit court for the proper county, in chancery, and must be signed by the plaintiff or his agent or attorney. It must be divided into paragraphs, numbered consecutively, and each paragraph should contain, as nearly as may be, a separate and distinct allegation. The prayer must also be divided into paragraphs, numbered consecutively, and must specify the particular relief to which the plaintiff considers himself entitled, and may also contain a prayer for general relief.

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[14] C. L. 1915, (11398); Howell, 2nd ed. §11452.

[15] C. L. 1915, (11399); Howell, 2nd ed. §11460.

[16] Brown v. Brown, 22 Mich. 245; Ward v. Ward, 20 Wis. 252.

[17] C. L. 1915, (11399); Howell, 2nd ed. 11460.

The prayer for process to bring the defendant into court, formerly required, may be omitted, and the plaintiff is entitled to such process on filing the bill, and to other necessary process when ordered by competent authority. If the plaintiff desires a temporary or permanent injunction to be issued, the bill should state the facts authorizing the writ and pray that it may be issued, and if temporary or preliminary relief is desired by way of injunction, the judge of the court must endorse on the bill an order for that purpose. A bill of complaint which does not comply with the rule in respect to being divided into paragraphs, numbered consecutively, will be stricken from the files on motion, unless the court in its discretion shall deem it proper to allow an amendment to cure the defect.

Good pleading also requires that needless repetition, such as "and the plaintiff further shows unto the court," should be avoided.[18]

### §400. Verification of Bills for Divorce.

All bills for divorce are required to be verified by the oath of the plaintiff, or in the case of his absence from the state, or other sufficient cause shown, by the oath of his agent, attorney or counsellor. The several matters stated in the bill should be stated positively, or upon information and belief only, as the fact may be.

The oath administered to the party must be, in substance, that he has read the bill, or has heard it read, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon his information and belief, and as to those matters he believes it to be true; and the substance of the oath must be stated in the jurat.[19]

The oath must also contain the following: "And you do solemnly swear (or affirm) that there is no collusion, understanding or agreement whatever, between yourself and the defendant herein, in relation to your application for a divorce."[20] This provision is mandatory and is based on public policy, which forbids divorce by agreement of the parties.[21]

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[18] New Mich. C. C. Rules, No. 24. Among the cases having a bearing on this subject, but which do not particularly construe the rule are the following: Spring v. Randall, 107 Mich. 103, 64 N. W. R. 1063; Southern v. Byles, 67 Mich. 296, 34 N. W. R. 702.

[19] C. C. Rule No. 27; Cummins & Beecher's Mich. Rule Book page 602.

The bill must allege, on oath, that the causes for divorce charged were all committed without the consent, connivance, privity or agreement of the plaintiff;[22] hence if any fact is introduced into the bill by way of amendment, to meet this requirement the bill must be sworn to again.[23]

A divorce will not be granted where the plaintiff is guilty of the same crime or misconduct as that charged against the defendant; therefore the bill should allege that the plaintiff has not been guilty of any such crime or misconduct as is charged against the defendant.[24]

### §401. Divorce Suits—How Commenced and Conducted.

Suits for divorce and suits to annul or affirm a marriage are commenced and conducted practically in the same manner as other suits in courts of equity, and the court has power to award issues, to decree costs and to enforce its orders and decrees to the same extent and in the same manner as in other causes.[25]

### §402. Suit to Annul Marriage—How Brought.

When a marriage is supposed to be void, or there arises doubt as to its validity, either party may file a bill in the circuit court for the county where the parties or one of them resides, or in the court of chancery, for annulling the same. The bill is required to be filed, and proceedings had thereon, substantially the same as in the case of a bill filed in the same court for a divorce, and upon due proof of the invalidity of the marriage it will be declared void by a decree or sentence of annulment.[26]

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[20] C. L. 1915, (11401); Howell, 2nd ed. §11462.

[21] Thompson v. Thompson, 70 Mich. 62, 37 N. W. R. 710; Ayres v. Wayne Circuit Judge, 90 Mich. 380, 51 N. W. R. 461; McWilliams v. Circuit Judge, 142 Mich. 226. 105 N. W. R. 611.

[22] Briggs v. Briggs, 20 Mich. 40.

[23] Green v. Green, 26 Mich. 437.

[24] C. L. 1915, (11401); Howell, 2nd ed. §11462; Warner v. Warner, 54 Mich. 494, 20 N. W. R. 557; Hoff v. Hoff, 48 Mich. 281, 12 N. W. R. 160; Morrison v. Morrison, 64 Mich. 53, 30 N. W. R. 93, Minde v. Minde, 65 Mich. 633, 32 N. W. R. 868; Peck v. Peck, 66 Mich. 586, 33 N. W. R. 893; Sissung v. Sissung, 65 Mich. 179, 31 N. W. R. 770; Kellog v. Kellog, 171 Mich. 518, 137 N. W. R. 249.

[25] C. L. 1915, (11403); Howell, 2nd ed. §11464; Sawyer v. Sawyer, Walk. Ch. 48; Entry of Decree *Nunc pro Tunc;* Newton v. Newton, 166 Mich. 421, 132 N. W. R. 91. Modification of Decree: Meyers v. Meyers, 161 Mich. 487, 126 N. W. R. 841. Amendment of Bill, Schafberg v. Schafberg, 52 Mich. 421, 18 N. W. R. 202.

But no marriage can be annulled on the ground of force or fraud, if it is made to appear that at any time before the commencement of the suit the parties have voluntarily cohabited as husband and wife.[27] Nor can the marriage of a lunatic be decreed to be void, if it is made to appear that the parties freely and voluntarily cohabited as husband and wife after the lunatic was restored to a sound mind.[27]

## §403. Form of Bill to Annul Marriage.

The formal parts of a bill to annul a marriage are substantially the same as a bill for divorce. If any children have been born of the supposed void marriage their names and ages should be stated substantially the same as in a bill for divorce. If the bill is filed by the wife it should be in the name which she bore prior to the marriage. And it would seem that if the bill is filed by the husband to annul a void marriage it should be against the wife in the name by which she was known prior to the marriage.

The reasons which are supposed to make the marriage void should be clearly and distinctly stated in the bill, and they must be such as the statute specifically mentions as sufficient to render the marriage void. No presumption against the validity of the marriage can be indulged.

No action can be brought to annul a marriage on the ground of the physical incapacity of one of the parties unless brought within two years from the solemnization of the marriage, and such suit can be maintained only by the injured party.[28]

## §404. Suits to Affirm a Marriage.

A bill to affirm a marriage may be filed when the marriage is denied or doubted by one of the parties. The bill must be filed by the party who asserts the validity of the marriage.

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[26] C. L. 1915, (11395); Howell, 2nd ed. §11455, C. L. '97, (8649); Howell, 2nd ed. §11486.

[27] C. L. 1915, (11427); Howell, 2nd ed. §11485.

[28] C. L. 1915, (11427); Howell, 2nd ed. §11488.

The bill is filed and the proceedings had thereon in the same manner as in divorce and annulment cases. Upon satisfactory proof of the validity of the marriage, the court will make a decree declaring the marriage valid, and unless reversed on appeal, such decree is conclusive upon all persons concerned or interested.[29]

The bill should state the names, ages and places of residence of the parties, the date of the marriage, the place where and the manner in which the marriage was solemnized, substantially the same as in a bill for divorce. If children have been born of the marriage their names and ages should be stated. The fact that the defendant denies the validity of the marriage must be stated, and the time, place and occasion of such denial should be made known to the court by the allegations of the bill. If the plaintiff bases his claim upon a valid marriage in another state, solemnized in the form prescribed by the statute of that state, the bill should state the time when, the place where, and the person by whom the marriage was solemnized, and the official capacity of the person who performed the ceremony. If the claim is based upon a valid common law marriage, the bill must state that at a certain time and place, naming them, the parties presently promised and agreed to take each other for husband and wife, and to live together in that relation, and that in pursuance of that agreement, and for the purpose of consummating the same, they actually did live and cohabit as husband and wife.[30]

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[29] C. L. 1915, (11395); Howell, 2nd ed. §11456.

[30] Judson v. Judson, 147 Mich. 518, 111 N. W. R. 78.

## CHAPTER XXXIV.

## BRINGING THE DEFENDANT INTO COURT.

§405. Summons—Form and Contents.
§406. Summons—How and When Served.
§407. Substituted Service.
§408. Affidavit for Order of Publication.
§409. Form of Affidavit.
§410. Appearance of the Defendant.

### §405. Summons—Form and Contents.

Upon filing the bill of complaint in the office of the clerk of the court, and paying an entry fee of three dollars, the plaintiff is entitled to a chancery summons, and to other process when ordered by competent authority.[1] The summons must notify the plaintiff that a bill of complaint has been filed against him by the plaintiff, naming him, and that if he desires to defend the same he is required to cause his appearance to be filed in the cause, in accordance with the rules and practice of the court, and the statute in such case made and provided, in person or by attorney, within fifteen days after service of the summons upon him; and the return day thereof must be indicated at the foot of the summons. The underwriting must designate against which defendant a personal decree is asked, and in divorce cases the underwriting must state whether alimony or custody of children is prayed for in the bill.[2]

### §406. Summons—How and When Served.

The summons must be served by delivering a copy to the defendant, subscribed by the plaintiff, his attorney, or the officer or person serving the same, and inscribed "copy," and showing the original under the seal of the court to the defendant at the time of such delivery. The service may be on or before the return day mentioned, but not afterwards.[3] It may be served by any sheriff, under sheriff or deputy sheriff, or by any person of suitable age and discretion. Proof of such service must be made by the affidavit of the person who makes the service, except when such service is made by an officer of the court authorized to serve process, in which case the certificate of the officer who makes the service is sufficient proof thereof.[4] Service may be made in any county of this state where the defendant may be found.[5] If there are minor children it must be served on the prosecuting attorney of the county where the suit is pending.

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[1] C. L. 1915, (12408); Cummins & Beechers Mich. Judicature Act §531.

[2] C. C. Rules 1916, No. 19; Cummins & Beecher's Mich Rule Book, page 584. The writ may be signed by the deputy clerk in his own name; Colton v. Rupert, 60 Mich. 320, 27 N. W. R. 520; Calender v. Olcott, 1 Mich. 344.

## §407. Substituted Service.

In certain cases where it is made to appear that personal service cannot be had within this state, the statute and rules of practice provide for a substituted service. In such cases an application may be made to the circuit judge or a circuit court commissioner for an order for the appearance of the defendant. The application must be made by affidavit of some person who has knowledge of the facts, and may be made at the time of filing the bill or at any time thereafter. The order, if made, requires the defendant to appear within three months from the date of the order. Such order can only be made upon proof by affidavit of some one of the following facts: *first;* that the defendant resides out of the state: *second;* that the defendant is a resident of this state, and that a summons for his appearance has been duly issued and that the same could not be served by reason of the absence of the defendant from the state, or his concealment therein, or by reason of his continued absence from his place of residence: or, *third;* that it cannot be ascertained in what state or country the defendant resides.[6] Within twenty days after the order is made it must be published in some newspaper printed in the county where the suit is pending, or in such other paper as the court may direct, and such publication continued once in each week for six successive weeks; but such publication will not be necessary in any case in which a copy of such order shall have been served personally on such absent, concealed or non-resident defendant at least twenty days before the expiration of the time prescribed for the appearance of the defendant. Proof of such publication or service must be made.[7] The court, when necessary, upon motion or petition of the plaintiff, may by further order extend the time for appearance of the defendant, and in such a case will direct the publication of such further order for such time as it may think proper.[8]

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[3] C. C. Rules No. 19, Sec. 2; Cummins & Beecher's Mich Rule Book, page 584.

[4] C. L. 1915, (12405); Cummins & Beecher's Mich. Judicature Act, §528.

[5] C. L. 1915, (12425); Cummins & Beecher's Mich. Judicature Act, §548.

[6] C. L. 1915, (12449); Cummins & Beecher's Mich. Judicature Act, §572.

In all cases where such order for the appearance of the defendant is made, a certified copy of the same must also be mailed to the defendant at his last known post office address, by registered mail, and a return receipt demanded, and proof by affidavit of such mailing must be filed, showing whether a return receipt has been received, and if one was received it must be attached to the affidavit.[9]

## §408. Affidavit for Order of Publication.

If the defendant is a resident of another state, the affidavit must show not only the fact of non-residence, but it must show the place of residence of the defendant, if known. If the state, or the particular place in the state where the defendant resides is not known, the affidavit should show what efforts have been made to ascertain his place of residence, and that such place cannot be ascertained.

If the defendant is a resident of this state, a summons must be issued and returned not served, and the reasons for not serving it must be shown by the return, and such reasons must be such as the law recognizes as sufficient to authorize the court to make the order of publication. The statute authorizing substituted service must be strictly construed and fully complied with. The rule is well established that all exceptional methods of service and of obtaining jurisdiction over persons must be confined to the cases prescribed by the statute, and must be exercised in the precise manner which the statute points out.[10] The statute clearly and distinctly requires that the cause for issuing the order must be made out by proof, and such proof must be made by some one who testifies on his own responsibility, and the process must be issued and diligent efforts made to serve it during the entire time allowed for service.[11]

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[7] C. L. 1915, (12450); Cummins & Beecher's Mich. Judicature Act, 573. All exceptional methods of obtaining jurisdiction over persons not found within the state, must be confined to the cases, and exercised precisely in the way provided for by the statute; Thompson v. Thomas, 11 Mich. 274; Steere v. Vanderberg, 67 Mich. 530, 35 N. W. R. 110; Montgomery v. Merrill, 36 Mich. 97; Jaffray v. Jennings, 101 Mich. 515, 60 N. W. R. 52; Schoenfeld v. Bourne, 159 Mich. 139, 123 N. W. R. 537. As to sufficiency of the affidavit for the order see Platt v. Stewart, 10 Mich. 260; Torrans v. Hicks, 32 Mich. 307.

[8] C. L. 1915, (12451); Cummins & Beecher's Mich. Judicature Act, $574.

[9] C. L. 1915, ~~(12466)~~; Cummins & Beecher's Mich. Judicature Act, §587.

12465 ✓

## §409. Form of Affidavit.

The affidavit must be entitled with the names of both plaintiff and defendant.[12] It may be made as soon as the bill is filed, but not before.[13] It must state facts of inquiry and information upon which is based the conclusion therein expressed that the defendant is absent from, or concealed within the state.[14] It must be made at or about the time the order is granted. Such an affidavit made five days before making an order for the appearance of an absent or non-resident defendant will not authorize the making of the order. The latter must be made upon facts existing at the time it is made, and it must state such facts as are stated in the affidavit as will show a statutory reason for making it. When made, on a proper affidavit, the order is an adjudication that the statutory cause existed at the time it was made. Consequently the affidavit must make a prima facie case, without which the order will be invalid, but the degree of proof is not subject to review.[15]

[10] Platt v. Stewart, 10 Mich. 260; King v. Harrington, 14 Mich. 532; Merrill v. Montgomery, 25 Mich. 73; People v. Dawell, 25 Mich. 269; Hartford Ins. Co. v. Owen, 30 Mich. 441; Dennison v. Smith, 33 Mich. 155; Hebel v. Amazon Ins. Co., 33 Mich. 400; Montgomery v. Merrill, 36 Mich. 101; Dewey v. Central Car Co., 42 Mich. 403, 4 N. W. R. 179; Colton v. Rupert, 60 Mich. 318, 27 N. W. R. 520; Morrison v. Morrison, 64 Mich. 53, 30 N. W. R. 903; Adams v. Judge, 98 Mich. 52, 56 N. W. R. 1051;

[11] Soule v. Hough, 45 Mich. 420, 8 N. W. R. 50.

[12] Arnold v. Nye, 11 Mich. 456.

[13] Gordon v. Tyler, 53 Mich. 70.
631, 19 N. W. R. 560, 20 N. W. R.

[14] Thompson v. Judge, 54 Mich. 236, 19 N. W. R. 967.

[15] N. Y. Baptist Union v. Atwell, 95 Mich. 239, 54 N. W. R. 460; Adams v. Circuit Judge, 98 Mich. 53, 56 N. W. R. 105; The affidavit may be made upon information and belief, but it should give the name of the informant, or the source from which the information is derived; yet if the affidavit contains some evidence of the fact necessary to be established it will be sufficient to give the Court jurisdiction to make the order; Pettiford v. Zoellner, 45 Mich. 358, 8 N. W. R. 57; Colton

## §410. Appearance of the Defendant.

If the summons has been personally served, and due proof of such service filed, the defendant must enter his appearance in the suit, either in person or by attorney, within fifteen days from the date of such service. Such appearance is entered by filing a notice thereof in the office of the clerk of the court, and serving a copy of the same on the attorney for the plaintiff. In cases where it becomes necessary to bring the defendant into court by publication or service of an order for his appearance, notice of such appearance must be filed and a copy thereof served on the attorney for the plaintiff within the time designated in the order.[16]

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v. Rupert, 60 Mich. 318, 27 N. W. R. 520; Morrison v. Morrison, 64 Mich. 53, 30 N. W. R. 903; Powell v. Pierce, 168 Mich. 427, 134 N. W. R. 447.

[16] C. C. Rules, 1916, No. 31; Cummins & Beecher's Mich. Rule Book, p. 606. Sec. 2; After general appearance the defendant is entitled to notice of all future proceedings; Connor v. Jochen, 171 Mich. 69, 137 N. W. R. 69; C. L. 1915, (12457); Cummins & Beecher's Mich. Judicature Act, §580.

# CHAPTER XXXV.

## PROCEEDINGS AFTER APPEARANCE OF DEFENDANT.

§411. Copy of Bill to be Served.
§412. Demurrers and Pleas Abolished.
§413. Motion to Dismiss.
§414. Default for not Appearing.
§415. Default for Want of Answer.
§416. Setting aside Default.
§417. Amending Pleadings.
§418. Answer:—Form of.
§419. Sworn Answer:—Effect of.
§420. Cross-Bills.
§421. Chancery Pleadings: How Verified.
§422. Before Whom Pleadings may be Sworn to.
§423. Supplemental Pleadings.
§424. Supplemental Bills:—Nature of; When Proper.
§425. Who to be Made Parties to a Supplemental Bill.
§426. Form of Supplemental Bill.
§427. Leave to File:—How Obtained; Process.
§428. Defenses to Supplemental Bill.
§429. Answers to Supplemental Bills.
§430. Evidence to Support Supplemental Bill.

### §411. Copy of Bill to be Served.

Upon receiving notice of the appearance of the defendant, the plaintiff must cause a copy of the bill of complaint to be served upon him or his attorney within fifteen days after receipt of the notice of appearance, unless a copy of the bill has been served with the summons.[17]

### §412. Demurrers and Pleas Abolished.

Under the former practice the defendant was required to file and serve his demurrer, plea or answer to the bill within fifteen days after service of a copy of the bill of complaint. The Judicature Act of 1915, however, abolishes demurrers and pleas, and provides that all questions heretofore required to be raised by plea or demurrer must now be raised by motion to dismiss, or in the answer.[18] If the objection to the bill raises a question of fact, it should be presented by the answer; if a question of law, by motion to dismiss.

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[17] C. C. Rules, 1916, No. 31, Sec. 2; Cummins & Beecher's Mich. Rule Book, p. 607.

## §413. Motion to Dismiss.

If objections to the bill are raised by motion to dismiss, the motion should be filed and a copy served within fifteen days after service of a copy of the bill. If a copy of the bill was served with the summons, such motion must be filed within fifteen days after such service. If the objection to the bill is raised by the answer, the same should be brought on for hearing and determination by the court in advance of the hearing on the merits, upon four days notice by either party. The plaintiff, at any time either before or after the hearing of the objections, may amend the bill so as to meet the objections raised thereto, upon such terms as the court may deem proper.[19]

On the hearing of all motions involving questions of fact, the court, in its discretion, may require the production of all of the witnesses for examination in open court.[20]

Irregularities as to service of process are waived where the defendant voluntarily enters a general appearance and answers the bill.[21]

But where there is a special appearance such irregularities are not waived.[22] After a general appearance by the defendant, he is entitled to notice of all subsequent proceedings.[23]

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[18] C. L. 1915, (12456); Cummins & Beecher's Mich. Judicature Act, §579; C. C. Rules, 1916, No. 31, Sec. 6; Cummins & Beecher's Mich. Rule Book, p. 608; any defect which would have been waived by failing to make an objection to a pleading by demurrer or plea under the former practice will be waived under the new practice if not timely raised by a motion to dismiss. Therefore the decisions involving the question of waiver by failure to demur or plead are applicable to the new practice; Jennison v. Haire, 29 Mich. 209, Barton v. Gray, 48 Mich. 164, 12 N. W. R. 30; Weaver v. Van Akin, 77 Mich. 588, 43 N. W. R. 1081; Fuller v. Jackson, 82 Mich. 480, 56 N. W. R. 721; Baent v. Kennicutt, 57 Mich. 268; 23 N. W. R. 808; Williams v. West Bay City, 119 Mich. 395, 78 N. W. R. 328; Arndt v. Bourke, 120 Mich. 263, 79 N. W. R. 190; Smith v. Cowles, 123 Mich. 4, 81 N. W. R. 916; McDonald v. Smith, 139 Mich. 211, 102 N. W. R. 668; Kern v. Verein, 139 Mich. 233, 102 N. W. R. 746; Sauer v. McClintic, 179 Mich. 618; Clark v. O'Rourke, 111 Mich. 108, 69 N. W. R. 147; Johnson v. Burke, 167 Mich. 349, 132 N. W. R. 1017.

[19] C. L. 1915, (12456); Cummins & Beecher's Mich. Judicature Act, §579.

[20] C. L. 1915, (12580); Cummins & Beecher's Mich. Judicature Act, §703.

[21] Greacen v. Buckley & Douglas Lumber Co., 167 Mich. 569, 133 N. W. R. 538; Thompson v. Benefit Association, 52 Mich. 522, 18 N. W. R. 247.

If the bill is taken as confessed by the defendant for want of answer, after he has entered a general appearance, notice of the order *pro confesso* must be served on his attorney, and also of all other proceedings subsequent to his appearance.[24]

## §414. Default for not Appearing.

If the defendant does not appear within fifteen days after service of the summons, upon due proof of the service and non-appearance the plaintiff may enter an order taking the bill as confessed by the defendant. Proof of service of the summons must be made by the certificate of the sheriff or other officer who made the service, or, if the service was made by some person not an officer, the proof of service may be made by such person. The affidavit should state the time, place, and manner of service, and the age and place of residence of the affiant.

If a substituted service has been had, the publication of the order for the appearance of the defendant, for the period of time prescribed in the order, must be shown by the affidavit of the publisher or printer of the paper in which the order was published.[25] In such case the fact of non-appearance may be shown by the affidavit of the plaintiff's attorney, showing that he has received no notice of appearance from the defendant, or by the certificate of the clerk of the court showing that no appearance has been filed or entered by the defendant.

## §415. Default for Want of Answer.

If the defendant does not cause his answer or motion to dismiss to be filed within fifteen days after service of a copy of the bill, the plaintiff, upon due proof that a copy of the bill has been served and that more than fifteen days have elapsed since such service, may file and enter an order taking the bill as confessed by the defendant.[26]

The court, on good cause shown, may extend the time for appearing or for filing any pleading. The application for such extension of time may be made by special motion or petition, and the reasons for such extension may be shown by the affidavit of any person having personal knowledge of the facts upon which the application is based.

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[22] Woodruff v. Young, 43 Mich. 548, 6 N. W. R. 85; Whipple v. Stewart, Walk. Ch. 357.

[23] Jenney v. O'Flynn, 5 Mich. 215; Kellogg v. Putnam, 11 Mich. 344.

[24] Martin v. McReynolds, 6 Mich. 70; Watson v. Hinchman, 41 Mich. 716, 3 N. W. R. 202.

[25] C. L. 1915, (12450); Cummins & Beecher's Mich. Judicature Act, §573; C. C. Rules 1916, No. 32; Cummins & Beecher's Mich. Rule Book, p. 609.

[26] C. C. Rules, 1916, No. 32, Sec. 3; Cummins & Beecher's Mich. Rule Book, p. 609.

### §416. Setting aside Default.

The order *pro confesso* may be set aside on special motion for cause shown, in the discretion of the court, on such terms as it may deem just and proper. To entitle a defendant to an order setting aside his default, for want of appearance or answer, he must proffer a sworn answer, showing a defense on the merits as to the whole or a part of the plaintiff's case.

In all cases where personal service shall have been had on the defendant, and proceedings taken on the default on the strength thereof, the default will not be set aside unless the application is made within six months after such default was regularly filed.

Subject to statutory provisions, in any case where personal service shall have been made upon the defendant, an order setting aside the default will be upon the condition that he pay the taxable costs incurred in reliance on the default, and the court may impose such other conditions as may be deemed proper.[27]

### §417. Amending Pleadings.

The plaintiff may amend the bill at any time before the answer is put in, or within ten days thereafter without leave of the court and without costs.

The defendant may amend his answer at any time within ten days after it is put in, without leave of the court and without costs.

In such cases no rule or order to amend is required, but a copy of the amended pleading, entitled "Amended Bill of Complaint" or "Amended Answer," as the case may be, must be filed and served, with a notice that it is a copy of the pleading as amended.

An answer on file will stand as an answer to an amended bill of complaint, unless an amendment to such answer is made within ten days after service of a copy of the amended bill of complaint.[28]

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[27] C. C. Rules, 1916, No. 32, Sec. 4; Cummins & Beecher's Rule Book, p. 609. Hews v. Hews, 145 Mich. 247, 108 N. W. R. 694; Emery v. Airth, 180 Mich. 433.

After the time for amending any pleading without costs or order of the court has expired, the court in which the action is pending has authority to amend any process, pleading or proceeding, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before the decree in the cause is rendered; and any defect or error which does not affect the substantial rights of the parties may be disregarded by the court.[29]

## §418. Form of Answer.

The answer should be as brief as the nature of the case will permit, and must not state facts of which the court takes judicial notice, nor matters of evidence.

Statements not required to be proved should be avoided in any pleading.[30] The answer should contain a plain and concise statement, without repetition, of the facts relied on as constituting a defense, and no others. It must be divided into paragraphs, numbered consecutively, each containing as near as may be a single allegation. Dates, sums and numbers may be expressed either in figures or words.[31]

The answer must contain an explicit denial or admission of each allegation in the bill of complaint, as to which the defendant has knowledge or belief. As to matters charged in the bill regarding which the defendant avers he has no knowledge or information sufficient to form a belief, he is not required to admit or deny the same, but the want of such knowledge must be stated. Every material allegation in the bill as to which no answer is made will be treated as admitted by the defendant.[32]

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[28] C. C. Rules, 1916, No. 28, Sec. 1-3; Cummins & Beecher's Mich. Rule Book, p. 604.

[29] C. L. 1915, (12478); Cummins & Beecher's Mich. Judicature Act, §601.

[30] C. C. Rules, 1916, No. 21, Sec. 3; Cummins & Beecher's Rule Book, p. 588.

[31] C. C. Rules, 1916, No. 21, Sec. 2; Cummins & Beecher's Rule Book, p. 588.

[32] C. C. Rules, 1916, No. 25, Sec. 2; Cummins & Beecher's Mich. Rule Book, p. 599. *Admissions and denials;* Explicit denial of every allegation in the bill must be made, where the defendant has any knowledge or belief; and where he has no such knowledge or information, sufficient to form a belief he should so state; Greilick v. Rogers, 144 Mich. 313, 107 N. W. R. 885; Hoock v. Sloman, 145 Mich. 19, 108 N. W. R. 447; Carpenter v. Hood, 172 Mich. 533, 138 N. W. R. 241.

### §419. Sworn Answer:—Effect of.

Whenever in a chancery suit a sworn bill of complaint is filed and a sworn answer demanded, the defendant is required to file such sworn answer; but neither a sworn bill nor a sworn answer has any force as evidence, except as to admissions, and on the hearing of motions and petitions.[33]

### §420. Cross-Bills.

If the defendant in a divorce suit denies the plaintiff's right to the relief prayed, and conceives himself entitled to a divorce or other affimative relief against the plaintiff, within the jurisdiction of the court in which the action is pending, he may file a cross-bill for such relief. When a cross-bill is to be filed, no separate answer should be filed, but the defendant, in the first division of his cross-bill, must answer the allegations of the bill in accordance with the general rules of practice as to answers, before setting forth the affirmative matters of the cross-bill. The part of the cross-bill setting forth the affirmative matter upon which affirmative relief is asked, the prayer for relief and the prayer for process, when required, must comply with the general rules of practice as to original bills of complaint; but no allegation properly made in the answer division of the cross-bill need be repeated in the affirmative division of the cross-bill.[34]

### §421. Chancery Pleadings:—How Verified.

All chancery pleadings which are required to be sworn to may be verified by the oath of the moving party therein, or, in case of his absence from the state, or for other sufficient cause shown, by the oath of his agent or attorney.[35]

In pleadings which are to be verified by the oath of the party, the several matters stated must be stated positively, or upon information and belief only, according to the fact. The oath administered to the party must be, substantially, that he has read, or heard read, the bill, cross-bill, or answer, as the case may be, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon his information and belief, and as to those matters he believes it to be true; and the substance of the oath must be stated in the jurat. If the pleading to be verified is a bill or cross-bill praying for divorce, there must be added to the oath administered to the party the statement that there is no collusion, understanding or agreement whatever between the parties as to the application for a divorce.

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[33] C. C. Rules, 1916, No. 21, Sec. 2; Cummins & Beecher's Mich. Rule Book, p. 588.

[34] C. C. Rules, 1916, No. 26, Sec. 1-2; Cummins & Beecher's Mich Rule Book, p. 604.

[35] C. C. Rules, 1916, No. 27, Sec. 1; Cummins & Beecher's Mich. Rule Book, p. 602. When the verification is by an agent, the jurat should state that the person verifying the pleading is the agent; but it seems that where a pleading is verified by the oath of the Attorney of the party filing it the Court will take judicial notice of that fact from the record; Burgh v. Poupard, Walk. Ch. 5.

## §422. Before Whom Pleadings may be Sworn to.

Any pleading required to be verified may be sworn to before any officer authorized by the laws of this state to administer oaths or take depositions. They may also be sworn to before any notary public or other person authorized by the laws of any other state or territory to administer oaths; but if sworn to in another state or territory there must be added the certificate of the clerk of some court of record of the county, under the seal of the court, showing the official character of the person administering the oath and the genuineness of his signature. Such pleading may be sworn to in any foreign country, before any minister or other diplomatic agent or consul of the United States, or any notary public; but the signature of such notary public of a foreign country must be under his notarial seal.[37]

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36. C. C. Rules, 1916, No. 27, Sec. 2; Cummins & Beecher's Mich. Rule Book, p. 602. A pleading which is required to be verified may be sworn to by the plaintiff if he has knowledge as to part of the facts and states the remainder on information and belief; and it is proper to state those facts which are alleged on information and belief, by the affidavit of such persons who have personal knowledge of such facts; Hartingh v. Circuit Judge, 176 Mich. 289, 142 N. W. R. 585. Unless a chancery pleading is required by statute or the rules of the Court to be verified, such verification is not necessary as a general rule, except in cases where it is desired to use such pleading as an application for preliminary relief for process which must be based on an order of the Court; Atwater v. Kinman, Har. Ch. 243; But Bills for divorce and cross-bills praying for divorce on the application of the defendant, must be verified; C. C. Rules, 1916, No. 59; Cummins & Beecher's Mich. Rule Book, p. 645.

[37] C. C. Rules, 1916, No. 27, Sec. 3; Cummins & Beecher's Mich. Rule Book, p. 603.

### §423. Supplemental Pleadings.

If, on the trial of the cause, the plaintiff desires to avail himself of matters occurring since the bill of complaint was filed, he must bring such matters to the attention of the court by supplemental bill. If the defendant desires to do so he must file a supplemental answer, or a supplemental cross-bill.

Upon the application of either party, the judge of the court in which the action is pending, upon reasonable notice and such terms as are just, may permit a supplemental pleading to be filed and served, avering material facts occurring after his former pleading was filed, or of which he was then ignorant, including a judgment or decree of a competent court, rendered after the commencement of the suit, determining the matter in controversy or a part thereof. But a supplemental pleading will not be considered a waiver of any former pleading. If the filing of such supplemental pleading is during a term of court when the cause is on the docket for trial, the court in its discretion, may grant a continuance, and the costs of the continuance are discretionary with the court.[38]

### §424. Supplemental Bills:—Nature of; When Proper.

A supplemental bill is used for the purpose of bringing before the court matters relating to the controversy which have arisen after the suit was commenced, or where a new interest in the matter in litigation is claimed by an existing party to the suit, or a new party claims, not by mere operation of law, the interest which was claimed by an existing party.[39] Occasion to use a supplemental bill in a divorce case does not often arise. The most frequent occasion to do so is where, after the suit is commenced, another or different cause for divorce has occurred.

### §425. Who to be Made Parties to a Supplemental Bill.

As a general rule, where a supplemental bill is filed on account of new matters which have arisen since the filing of the original bill, all defendants in the original bill should be made defendants in the supplemental bill.[40] But in divorce cases the only parties are the plaintiff and the defendant, and they only can be made parties to a supplemental bill.

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[38] C. C. Rules, 1916, No. 29; Cummins & Beecher's Mich. Rule Book, p. 606. J. A. 1915, Ch. 14, Sec. 15, Page 89.

[39] Graves v. Niles, Har. Ch. 332; Barnett v. Powers, 40 Mich. 317; 1 Hoff. Ch. Prac. 393; 2 Danl. Ch. Prac. 1673; Story's Eq. Pl. Sec. 332-3-4; Barton's Suit In Equity, 128; Jones v. Jones, 3 Atk. 110; Stafford v. Howlett, 1 Paige, 201.

### §426. Form of Supplemental Bill.

The supplemental bill should state the filing of the original bill and the substance of it, the purpose for which it was filed, and the proceedings which have been had thereon.[41] If it is filed to get the benefit of matters pertaining to the litigation which have arisen since the filing of the original bill, it must state such matters, and pray that the defendant be required to answer the matters therein alleged.[42]

### §427. Leave to File—How Obtained; Process.

Leave to file a supplemental bill must be obtained by application to the court in which the original bill is pending. It has been held that leave to file a supplemental bill will be granted upon an *ex parte* hearing, if there is probable cause for filing it; that the court examines the question only so far as to determine that the privilege is not being abused for the purpose of delay or vexation of the defendant, and that only in a case of doubt will the court direct notice of the application to be given to the defendant.[43] But under the Michigan rules of practice (C. C. Rules, 1916, No. 29) it is necessary to give reasonable notice of the application.

The summons to appear and answer the supplemental bill should be signed, sealed and tested, and be in practically the same form as the summons to appear and answer the original bill. But it is not necessary to issue a summons against a defendant who has appeared by attorney and answered the original bill. In such case service of a copy of the supplemental bill on the attorney for the defendant will be sufficient.[44]

### §428. Defenses to Supplemental Bill.

The defenses to supplemental bills are substantially the same as in other cases. In cases where, under the former practice, a plea or demurrer to the supplemental bill might be interposed, all questions which could be raised in that way must now be raised by motion to dismiss the supplemental bill.

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[40] Jones v. Jones, 3 Atk. 110; 2 Danl. Ch. Prac. 1533.

[41] Story's Eq. Pl. Sec. 343.

[42] Story's Eq. Pl. 343; Mitf. Eq. Pl. 76.

[43] Graves v. Niles, Har. Ch. 332; 1 Hoff. Ch. Prac. 403; Eager v. Price, 2 Paige, 337; Lawrence v. Bolton, 3 Paige, 294.

[44] 1 Hoff. Ch. Prac. 404; 2 Barb. Ch. Prac. 76.

Under the former practice, a motion would not lie to strike the supplemental bill from the files on the ground that it does not state supplemental matter; the proper practice in such case being to demur.[45] But in Michigan the Judicature Act of 1915 abolishes pleas and demurrers, and a motion to dismiss the supplemental bill would be proper in such case.[46]

### §429. Answers to Supplemental Bills.

If a defendant in a supplemental bill does not move to dismiss, he must put in his answer the same as in case of an original bill. If he is called on to answer the original bill at the same time he answers the supplemental matter, the answer to both should be included in the same pleading,[47] although it probably would not be fatal to separate them. Under the present Michigan practice no replication to the answer to the supplemental bill is required. The issue is made complete when the answer to the bill is filed and served.

### §430. Evidence to Support Supplemental Bill.

If the new matter charged in the supplemental bill is not admitted by the defendant in his answer, it must be proved; otherwise the supplemental bill will be dismissed with costs.[48]

A supplemental suit is merely a continuation of the original suit, and whatever evidence was properly taken under the original bill may be made use of under the supplemental bill. And other witnesses may be examined as to the new matter contained in the supplemental bill.[49] And where the supplemental bill is filed, and issue joined or default entered before the hearing on the original suit, the witnesses in the original suit may be examined in the supplemental suit. In such case the matters contained in the original bill and the supplemental bill should be heard as one suit.[50]

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[45] Jennison's Ch. Prac. 365; Bowen v. Bright, 13 Price, 316.

[46] C. L. 1915, (12658); Cummins & Beecher's Mich. Judicature Act, §781.

[47] Jennison's Ch. Prac. 366.

[48] 2 Barb. Ch. Prac. 79.

[49] 2 Barb. Ch. Prac. 77-78.

[50] 2 Barb. Ch. Prac. 78; 3 Danl. Ch. Prac. 186.

# CHAPTER XXXVI.

## PROCEEDINGS AFTER ISSUE JOINED OR DEFAULT ENTERED.

§431. Evidence—How Taken.
§432. Reference to Take Testimony—How Obtained.
§433. Testimony—How Taken.
§434. Testimony in Open Court—Objections to.
§435. Witnesses in Divorce Cases.
§436. Alimony and Expenses.
§437. Temporary Alimony—How procured.
§438. Order for Temporary Alimony and Expenses—Contents of.
§439. Questions of Guilt not Considered.
§440. Amount of the Allowance.

### §431. Evidence—How Taken.

Formerly, unless within ten days after filing the replication notice was given by one of the parties of an election to have the witnesses examined in open court, the testimony was required to be taken before a circuit court commissioner, and by him reported to the court.

But by the Michigan Judicature Act of 1915, the testimony in all chancery cases is required to be taken in open court as in actions at law, unless the court shall specially order a reference to a circuit court commissioner, or some other person authorized by the laws of this state to administer oaths, to take such testimony; but this provision is not to be construed as precluding taking depositions in chancery suits in any cases provided for by any law of this state.[1]

### §432. Reference to Take Testimony—How Obtained.

In case either party desires to have the testimony to be used in the case taken before a circuit court commissioner, or other person, an application for that purpose may be made to the court. This should be by special motion or petition, and should be supported by affidavits, or a sworn petition, showing the reasons therefor, and notice of such application should be given to the attorney of the opposite party, or to the party himself if he appears in person. A copy of the application, together with a notice of the time and place when and where it will be heard, must be served at least four full days before the day of hearing, and the application itself must be filed with the clerk of the court on or before the day of hearing. If the court deems the showing sufficient, an order may be made referring the matter to a circuit court commissioner, or some other suitable person who is authorized by the laws of this state to administer oaths. The order should be entitled in the cause and should state the time within which the testimony is to be taken.

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[1] C. L. 1915, (12489); Cummins & Beecher's Mich. Judicature Act, §612.

The making of the order appears to be discretionary with the court and it would seem from the language of the statute that the court, in its discretion, may make the order without the application of either party.

### §433. Testimony—How Taken.

The officer to whom any such reference is made is required to take such proofs as may be offered by either of the parties. The bill will not be considered evidence of any facts stated therein. The officer to whom the matter is referred should procure the testimony to be reduced to writing and signed by the witnesses. Each witness should be sworn in the usual manner before his testimony is taken, and all objections to any testimony offered should be noted.

After the testimony is taken, reduced to writing and signed by the witnesses, the officer is required to report the same to the court in which the suit is pending.[2]

The report of the officer should be attached to the testimony taken, and should show the date that it was taken, the names of the witnesses and the names of the attorneys who appeared for the respective parties, and the same should be filed with the clerk of the court as soon as convenient after the taking of the testimony is completed.

### §434. Testimony in Open Court—Objections to.

The Judicature Act of 1915 makes a radical change in the manner of taking the testimony of witnesses in chancery cases. The statute now requires "that in all chancery cases the court shall rule upon all objections to the competency, relevancy or materiality of testimony or evidence offered, the same as in suits at law; and in all cases where the court is of the opinion that any testimony offered is incompetent, irrelevant or immaterial the same shall be excluded from the record."[3]

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[2] C. L. 1915, (12792-4); Cummins & Beecher's Mich. Judicature Act, §915-7.

Provision is made however, "that if the testimony so offered and excluded is brief, the court may in its discretion permit the same to be taken down by the stenographer, separate and apart from the testimony received in the case; and in case of appeal such excluded testimony may be returned to the appellate court under the certificate of the trial court. If such excluded testimony is not taken and returned to the Supreme Court, on appeal, and upon the hearing in the Supreme Court, such court shall be of the opinion that any such excluded testimony is competent and material, it may order the same to be taken by deposition, or under a reference, and returned to said court." [4]

## §435. Witnesses in Divorce Cases.

In divorce cases either party may be examined as a witness, except in those cases where the proceedings are instituted in consequence of the adultery of the husband or wife.[5]

If a child under the age of ten years is produced as a witness for either party, the court is required to examine such child and ascertain to its own satisfaction whether such child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted as a witness; and in such case the child may be admitted as a witness, and its testimony given on its promise to tell the truth instead of upon oath or affirmation.[6] Such examination by the court may be conducted publicly or privately in the discretion of the court.

In other respects, the general rules as to the competency of witnesses are applicable to divorce cases and to suits to annul or affirm marriages.

## §436. Alimony and Expenses.

Alimony, in a general sense, means the allowance required by law to be made to a wife, out of her husband's estate, for her support, either during a matrimonial suit, or at its termination.

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[3] C. L. 1915, (12493); Cummins & Beecher's Mich. Judicature Act, §616.

[4] C. L. 1915, (12493); Cummins & Beecher's Mich. Judicature Act, §616.

[5] C. L. 1915, (12555); Cummins & Beecher's Mich. Judicature Act, §678.

[6] C. L. 1915, (12556); Cummins & Beecher's Mich. Judicature Act, §679.

From this definition it will be seen that alimony is either temporary or permanent. Temporary alimony is that which is required to be paid during the pendency of the suit, and is technically called alimony *pendente lite.* Permanent alimony is that which is required to be paid at or after the termination of the suit. Alimony *pendente lite* may properly be said to include suit money, or an allowance made to the wife for the payment of counsel fees and expenses of the suit.[7]

### §437. Temporary Alimony—How Procured.

Where the wife is entitled to temporary alimony in a matrimonial suit, application must be made to the court by special motion or petition, setting forth the reasons for the application. The petition or affidavits in support of the motion should be entitled in the cause, and should state the pendency of the suit; by which of the parties it was instituted; the means which the wife has for her support, if any; the number and ages of the children of the marriage, if any, who are dependent upon her for their support; and the financial ability of the husband, or his earning capacity, as near as can be ascertained. The motion or petition for alimony should be filed in the office of the clerk of the court in which the action is pending, and a copy served on the attorney for the husband, or on the husband himself if he has not entered an appearance by attorney, with a notice of the time when and the place where the motion will be heard. At least four full days notice must be given of the hearing of the motion.[8]

If the motion is opposed and any questions of fact are involved, the court, in its discretion, if it deems it necessary in order to reach a just conclusion as to such facts, may require the production of all or any of the witnesses having knowledge of the matters of fact involved in the motion or petition, to be examined in open court.[9]

### §438. Order for Temporary Alimony and Expenses—Contents of.

If the showing made by the wife is sufficient to authorize it, the court makes an order requiring the amount determined to be paid within such time as the court may deem proper.

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[7] 14 Cyc., Page 743; Waters v. Waters, 49 Mo. 385.

[8] C. C. Rules, 1916, No. 15, Sec. 1-2; Cummins & Beecher's Mich Rule Book, p. 577.

[9] J. A. 1915, Sec. 8, Page 114.

The order should be entitled in the court and cause, and should state the amount to be paid for counsel fees, the amount for other expenses of the suit, and the amount to be paid for the support of the wife, and such children of the marriage if any as are dependent on her for support, during the pendency of the suit, at such stated periods as may be determined by the court.[10]

## §439. Questions of Guilt not Considered.

The question of the guilt or innocence of either party will not be entered into in settling and determining the amount of alimony and expenses *pendente lite,* by hearing conflicting affidavits.[11]

The wife who makes application for temporary alimony and expenses must, however, in her application, deny the charges made in the bill or cross-bill as the case may be; or show some valid defense to her husband's suit, unless she has denied it on oath by her answer.[12]

It has been held, however, that the husband may show, on the hearing of the wife's application for temporary alimony, that her misconduct is so glaring that no aid should be given her to prosecute her suit; or, if she is charged with adultery, that she is still living with the partner of her guilt.[13]

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[10] C. L. 1915, (11404); Howell, 2nd ed. §11465; This statute makes no mention of temporary alimony, but it is conformatory of the common law which had been acted upon by the Courts before we had any statutory provision on the subject; Story v. Story, Walk. Ch. 421.

Without this power in the Courts, a wife who has no separate property of her own would be without means to support herself and children during the pendency of the suit; Goldsmith v. Goldsmith, 6 Mich. 286; Haines v. Haines, 35 Mich. 143.

Temporary alimony may be allowed though the wife has property of her own, if the income thereof is not sufficient for her support; Haines v. Haines, 35 Mich. 143; Rose v. Rose, 53 Mich. 585, 19 N. W. R. 195; Potts v. Potts, 68 Mich. 495, 36 N. W. R. 240.

The amount of temporary alimony to be allowed is in the discretion of the Court; Ross v. Griffin, 53 Mich. 7, 18 N. W. R. 195; Froman v. Froman, 53 Mich. 581, 19 N. W. R. 193; Rossman v. Rossman, 62 Mich. 429, 29 N. W. R. 33.

[11] Wood v. Wood, 2 Paige Ch. 114; Osgood v. Osgood, 2 Paige Ch. 621; Smith v. Smith, 1 Edw. Ch. 225.

[12] Osgood v. Osgood, 2 Paige Ch. 621; Wood v. Wood, 2 Paige Ch. 114.

[13] Fowler v. Fowler, 4 Abbott, (N. Y.) 412.

## §440. Amount of the Allowance.

The whole matter of the allowance of alimony *pendente lite* rests in the sound discretion of the court to which application is made. Such allowance should be limited to what is reasonably necessary for the support of the wife and children during the pendency of the suit, and to their reasonable and necessary expenses, until the result of the suit establishes her right to a more liberal allowance.[14]

The amount to be allowed, of course, depends upon the particular circumstances of each case, and in determining the amount the ability of the husband to pay should receive the fair consideration of the court. The amount to be allowed may be determined and settled by the court without a reference whenever the facts sufficiently appear to enable the court to justly and fairly determine the amount necessary to be paid.[15]

The court will take into consideration the condition and means of the husband, the means and condition of the wife, the ages and number of children to be cared for, and the extent of their claims upon the husband and father. When the husband is complainant his poverty is no excuse, and will not protect him as a defense to an application for alimony, but the fact of such poverty may be taken into consideration by the court in fixing the amount he is required to pay. If weekly or monthly payments are ordered, they should be only in such amounts as to be reasonably sufficient for the necessities of the wife and children dependent on her for support, and not large enough to make it an object to prolong the suit.

Probable cause for the suit, the wife's necessities and the husband's ability are the controlling considerations in determining whether alimony *pendente lite* and suit money will be allowed, and the amount thereof.[16]

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[14] Haines v. Haines, 35 Mich. 138.

[15] Hammond v. Hammond, 16 Clarke (N. Y.) 151; Monroy v. Monroy, 1 Edw. Ch. 382.

[16] Burgess v. Burgess, 25 Ill. App. 525; Filer v. Filer, 77 Mich. 469, 43 N. W. R. 887.

# CHAPTER XXXVII.

# OTHER INTERLOCUTORY PROCEEDINGS.

§441. Injunction to Restrain Sale or Incumbrance of Property.
§442. Injunction to Restrain Threatened Injury.
§443. Proceedings to Compel Payment of Temporary Alimony.
§444. Compel Payment of Temporary and Permanent Alimony.
§445. Due Process of Law.

## §441. Injunction to Restrain Sale or Incumbrance of Property.

Besides proceedings for the award of temporary alimony, it frequently becomes necessary in divorce and annulment cases to institute other interlocutory proceedings.

A temporary injunction is sometimes employed to restrain the husband from disposing of his personal property during the pendency of the proceedings for a divorce or for the annulment of a marriage. If in her bill for divorce, or answer and cross-bill, the wife alleges that the husband is about to dispose of his property, or that he threatens to do so, for the purpose of preventing the wife from recovering alimony, the court in its discretion may issue a temporary injunction to restrain him from doing so.

To entitle the wife in such case to a temporary injunction it must be shown clearly by the allegations of the bill or cross-bill that there is imminent danger that the husband will dispose of his property so as to prevent the wife from enforcing a decree for alimony if she procures such decree. The bill should then be presented to the judge of the court in which the action is about to be commenced, and if he deems it sufficient to authorize the issuing of the writ, he endorses upon the bill an order that upon the filing of the bill an injunction be issued according to the prayer thereof. Upon the filing of the bill with such order endorsed, the clerk of the court issues the writ under the seal of the court, and it then may be served in the same manner that a summons is required to be served. The injunction must be specifically prayed for in the bill.[1]

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[1] C. C. Rules, 1916, No. 24, Sec. 3; Cummins & Beecher's Rule Book, p. 597.

## §442. Injunction to Restrain Threatened Injury.

A temporary injunction is also sometimes employed to restrain one of the parties to a divorce suit from injuring the person or property of the other party. An injunction will be issued for such purpose only when it is made to appear clearly to the court that threats of injury to person or property have been made, and that there is imminent danger of such threats being carried into execution.

An injunction to restrain a husband from imposing any restraint upon the personal liberty of the wife may be issued upon the petition of the wife, after the bill is filed in an action for divorce or for the annulment of a marriage.[2] The application for such injunction may be made by the wife, and if the facts set forth in the petition are sufficient to warrant it, the writ will be issued. If the facts upon which the application is made arise after the bill is filed, a petition should be filed by the wife stating facts sufficient to satisfy the court that a necessity for such restraint exists. Upon the application for the writ, either at the time of the commencement of the suit, or afterwards by petition or cross-bill, the circuit judge may grant a temporary injunction, or may make an order requiring the other party to show cause, at a time and place to be stated in the order, why the writ should not issue. The order should also state the time and manner in which service of the same is to be made. In case the circuit judge of the circuit in which the action is pending or is about to be commenced "is sick, absent, or in any other manner disqualified from ordering or allowing an injunction, upon due proof of such facts by affidavit, the circuit judge of any judicial district adjoining the judicial district in which said court or county is situated, shall have authority, at chambers, or at any place where he may be, to grant or deny such injunction the same as if he were the circuit judge of the circuit in which such suit is pending or is about to be commenced, and after such injunction is allowed, as aforesaid, the judge ordering the same shall have concurrent jurisdiction to modify or dissolve the same with the presiding judge of the circuit wherein such suit is pending."[3]

The object and purpose of a temporary injunction in an action for divorce or to annul a marriage is to preserve the rights of the parties pending the litigation, and to enable the court to do justice between them in the final disposition of the case.[4]

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[2] C. L. 1915, (11405); Howell, 2nd ed. §11466; In re Gi 1120 Wis. 686.

[3] C. L. 1915, (12675); Cummins & Beecher's Mich. Judicature Act, §798.

### §443. Proceedings to Compel Payment of Temporary Alimony.

After an order for temporary alimony has been granted, a certified copy of the same should be served upon the husband and also upon his attorney, and, at the time the money becomes due and payable, a written demand for the money, specifying the amount due, should also be served upon the husband.[5] If payment of the money is refused or neglected to be made without reasonable cause, an affidavit should be prepared showing the time, place and circumstances surrounding the service of the certified copy of the order for alimony, and service of the written demand and refusal, the amount of alimony due, the fact that it has not been paid, and the refusal or contumacious neglect of the husband to pay the same. Such affidavits, a true copy of the written demand referred to in the affidavit of the person serving the same, and a certified copy of the order for temporary alimony, may then be presented to the court *ex parte* and the court will then grant an order requiring the husband to show cause why he should not be punished for contempt in refusing to pay the alimony ordered.

The order to show cause should be made returnable at a time and place to be stated in the order, and a reasonble time should be given to enable a defense to be prepared. The order also should state the length of time before the return day within which service of the same is to be made. On the return day of the order, or at such other time as the court may direct, the answer of the husband to such order must be presented to the court, together with such other affidavits in support of it as the party or his attorney may deem advisable.

If the answer and affidavits in support of it show reasonable and sufficient cause for the refusal and neglect to pay the alimony ordered by the court, the proceedings will be dismissed. If no sufficient cause is shown, a precept will be issued by the court to commit the husband to prison until the amount of temporary alimony, and costs due and payable, is paid.[5]

The purpose of this provision is to enable the court to enforce compliance with its interlocutory orders for the payment of a sum of money or costs where no other means of enforcement is provided by the statute.[6] Under this provision it is not necessary to file interrogatories and to give the husband an opportunity to produce witnesses to rebut the showing made by the wife,[7] but before a party can be punished by imprisonment for refusing payment of alimony or costs, or any sum of money ordered by the court, he should be given an opportunity to be heard.[8] A party will not be brought into contempt for non-payment of alimony unless a proper demand and refusal is shown.[9] The proceedings mentioned in this section are applicable only to the enforcement of payment of temporary alimony where a fixed sum is ordered by the court to be paid to the wife.

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[4] 14 Cyc., Page 661; Scholer v. Scholer, 77 Ga. 60; Kirby v. Kirby, 1 Paige (N. Y.) 261.

[5] C. L. 1915, (12271); Howell, 2nd ed. §12617, J. A. 1915, Ch. 5, Sec. 4, Page 48, c. & B. J. A. 1915, Page 148.

### §444. Compel Payment of Temporary and Permanent Alimony.

In 1913 the legislature passed an act entitled: "An Act to Facilitate the Collection of Temporary and Permanent Alimony to be Paid in Suits for Divorce."

This act provides that "in all suits for divorce or separate maintenance, where an order or decree for the payment of temporary or permanent alimony has been made, and where the party, whether complainant or defendant, has appeared in person or by solicitor, or has been personally served with process within the jurisdiction of the court making such order or decree for the payment of alimony, the court making such order or decree shall have power to punish by fine or imprisonment or both, any neglect or violation of said order, upon the petition of the party whose rights thereunder may have been impaired, impeded or prejudiced by such neglect or violation of said order."[10]

The next section provides that "when any decree or order shall be made for the payment of temporary or permanent alimony, to be paid in certain stipulated payments, directed to be made in said order to the register (now clerk) of the court, and any such payments shall be in default, the party prejudiced thereby may make a motion before the court making such order, showing by the records in the register's (clerk's) office that such default has been made, and thereupon the court shall forthwith issue an attachment to arrest such party in default and bring him immediately before the court to answer for such neglect.[11] The next section provides that "no demand of any kind, or notice of the making of the order for the payment of such alimony, shall be necessary in the cases enumerated in the first section of this act."[12]

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[6] Swartout v. Lucas, 102 Mich. 494, 60 N. W. R. 973.

[7] Ervay v. Ervay, 120 Mich. 525, 79 N. W. R. 802.

[8] Steller v. Steller, 25 Mich. 159.

[9] Brown v. Brown, 22 Mich. 299; Edison v. Edison, 56 Mich. 185, 22 N. W. R. 264.

[10] C. L. 1915, (11443);

When such attachment is issued it is required to be served by the sheriff of the county or by any officer authorized to make such arrest. Such officer must arrest the party named in the attachment and keep him in actual custody and bring him forthwith before the court issuing such attachment, and keep and detain him until the court shall make some further order in the premises.

The party arrested under the provisions of this act may be discharged from such arrest upon executing and delivering to the register (clerk) of the court issuing such attachment a bond with two sufficient sureties, in a penal sum to be fixed by the register (clerk), conditioned for the immediate and faithful performance of the terms of said order for the payment of alimony, or said party may be discharged from arrest by such other order in the premises as the court may make therein.[14]

This statute is a peculiar one and there may be a very serious question whether it has any force so far as the object expressed in its title is concerned. The object expressed in the title, and its avowed purpose, is "to facilitate the collection of temporary and permanent alimony." The act itself gives the court power to punish by fine and imprisonment, or both, any neglect or violation of such order, upon the petition of the party whose rights thereunder are impaired, impeded or prejudiced by such neglect. The act applies only to an order or decree directing money to be paid in certain stipulated amounts to the register (clerk) of the court. It does not purport in any way to change, add to, or take from the authority of the court to enforce the payment of alimony by contempt proceedings as provided by Compiled Laws of 1897, Section 10894, Howell's Statutes, 2nd. Ed., Section 12617, and Compiled Laws of 1897, Section 10890, Subdivision Three, Howell's Statutes 2nd. Ed., Section 12614, unless Section Six, which provides that "all acts or parts of acts contravening any of the provisions of this act are hereby repealed," by implication repeals those sections. The Judicature Act of 1915 does not in express terms repeal act No. 379 of the Public Acts of 1913, and if the latter act, which took effect August 15th, 1913 repealed the former statute above referred to, they were re-enacted without change by the Judicature Act, which took effect January 1st, 1916.[15]

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[11] C. L. 1915, (11444);

[12] C. L. 1915, (11445);

[13] C. L. 1915, (11446);

[14] C. L. 1915, (11447);

The re-enactment of the earlier statutes, however, would not necessarily repeal entirely Act No. 379 of the Public Acts of 1913, for the reason that some of its provisions are not inconsistent with the provisions of the Judicature Act, and if valid on other grounds the act of 1913 is still in force. It may be questioned seriously, however, whether the act of 1913 above referred to is valid on constitutional grounds. No proceedings can be had under the provisions of the act until some specified sum of money becomes due and payable according to the terms of the order or decree. When such sum is due and payable it becomes a debt, due and owing by the party against whom the order is made, and the act in question authorizes the court to punish the party for non-payment of such debt, by fine or imprisonment or both. With imprisonment for debt forbidden by the constitution, a party cannot be imprisoned for non-compliance with the order of the court for the payment of money, except on the ground of contempt of the authority of the court.[16] While it is very clear that it is not the intention or purpose of the constitution to take from the courts the power to punish a contempt of the authority of the court, the punishment provided for by this statute does not appear to be of that kind. Such punishment may be by fine, in such amount as the court may see fit to impose, in case the party is unable to give the bond with two sureties provided for in Section Five of the act, and in addition to a fine the court may impose such term of imprisonment as it may think proper.

It would seem to be the safer practice, until such time as the courts have occasion to pass upon the validity of this act, to treat it as superseded by the Judicature Act before mentioned.

The authority of the legislature to enact a law for the punishment of a person by fine and imprisonment, without giving him any sort of right to a defense, may well be doubted. The act in question provides that "no demand of any kind or notice of the making of the order for the payment of such alimony shall be necessary in the cases enumerated in the first section of the act." There seems to be an unbrokenn line of authority that before a person can be committed for contempt of the authority of the courts, there must be a personal demand for compliance with some order which the court has made, and a contumacious refusal.[17]

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[15] C. L. 1915, (12268 & 12271); Cummins & Beecher's Mich. Judicature Act, §391 and §394.

[16] Steller v. Steller, 25 Mich. 159.

## §445. Due Process of Law.

The act of 1913 is well calculated to deprive a person of liberty and property or both, without due process of law, inasmuch as it gives the party proceeded against in accordance with its provisions, no opportunity to be heard in defense of the accusation made against him.[18] The fundamental conception of a court of justice is condemnation only after a hearing. To say that courts have inherent power, or that the legislature may give them the power, to deny all right of the citizen to defend against an accusation, and to render decrees without a hearing, is, in the very nature of things, to convert the court exercising such authorty into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power depends.[19] The principle that a person cannot be condemned without a hearing lies at the foundation of all well ordered systems of jurisprudence. Wherever one is assailed in his person or property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all civilized nations. A sentence of a court, pronounced against a party without a hearing, or without giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.[20]

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[17] Edison v. Edison, 56 Mich. 185, 22 N. W. R. 246; Brown v. Brown, 22 Mich. 247; Steller v. Steller, 25 Mich. 159.

[18] Michigan Constitution, Art. 2, Sec. 16; U. S. Constitution, Art. 14, Sec. 2.

[19] Hovey v. Elliot, 167 U. S. 409, 42 L. ed. 215.

[20] McVeigh v. U. S., 78 U. S. 259, 20 L. ed. 80; Due process of law involves and implies not only the right to be heard, but a hearing in compliance with established methods of procedure; *Ex-parte* Wall, 107 U. S. 289, 27 L. ed. 562; Hurtado v. California, 110 U. S. 535, 28 L. ed. 238; Hagar v. Reclamation District No. 108, 111 U. S. 708, 28 L. ed. 572; Harris v. Hardeman, 55 U. S. 341, 14 L. ed. 447; Lasere v. Rochereau,

The enforcement of the only sentence which the court can impose under the provisions of Act No. 379 of the Public Acts of 1913 would apparently deprive the party against whom such sentence or order is made of his liberty or property without due process of law.

84 U. S. 438, 21 L. ed. 695; Taylor v. Porter, 4 Hill, 140, 40 Am. Dec. 274; Pennoyer v. Neff, 95 U. S. 733, 24 L. ed. 572; Scott v. McNeal, 154 U. S. 34, 38 L. Ed. 896; Crain v. U. S. 162, 40 L. ed. 1097; Walker v. Sauvinet, 92 U. S. 93, 23 L. ed. 679.

*Due Process of Law*: The provision of the constitution that no person shall be deprived of life, liberty, or property without due process of law is intended to secure to the citizen the right to a trial according to the forms of law, of the question of his liability and responsibility before his person or his property shall be condemned; Parsons v. Russel, 11 Mich. 113, 83 Am. Dec. 728.

*Due Process of Law*, within the meaning of the constitution, is laws which are general in their operation and not special acts of legislation passed to affect the rights of particular individuals against their will, and in a way which the same rights of other persons are not affected by existing laws; Attorney General v. Jochim, 99 Mich. 358, 58 N. W. R. 611, 23 L. R. A. 699, 41 Am. St. R. 606.

The due process of law required by the constitution means that notice or summons shall be given or served by which a party is tendered his day in court, with the right to frame an issue and be heard, before judgment can be rendered or execution issued which will take away his liberty or his property; Rouse, Hazzard & Co. v. Donovan, 104 Mich. 233, 62 N. W. R. 359, 27 L. R. A. 577, 53 Am. St. R. 457.

*Due Process of Law*, is not necessarily judicial process; Weimer v. Banbury, 30 Mich. 201.

# CHAPTER XXXVIII.

# MOTIONS AND AFFIDAVITS.

§446. Motions Classified.
§447. Motions Granted of Course.
§448. Special Motions and Petitions.
§449. Motions—Framing Issues on Hearing.
§450. Witnesses on Hearing of Motions.
§451. Common and Special Orders.

## §446. Motions Classified.

Motions in causes pending in court are of two kinds, motions of course and special motions. Motions of course are those applications which require no notice, and upon which orders may be entered by the clerk of the court without actual application to the court. A special motion is one not granted of course, but which is founded on the pleadings, upon affidavits, petitions, or some previous order of the court, and which cannot be granted without special application to the court. Special motions are of two kinds; *ex parte*, where no notice of the application is necessary to be given, and motions, special notice of which is required to be given according to the rules and practice of the court.

## §447. Motions Granted of Course.

An application or motion for an order which may be granted of course without special application to the court must be supported by affidavit or sworn petition. Such motions in divorce cases are entries of orders *pro confesso*, for non appearance, for not putting in an answer after service of a copy of the bill, for not serving copy of the bill after appearance and demand therefor, and all applications which according to the rules and practice of the court may be made without notice and without special application to the court.

In all such applications in chancery cases the attorney for the party in whose behalf the application is made prepares and files with the clerk of the court affidavits setting forth the facts which entitle the party to the order desired. The attorney should also prepare and sign such order as his client is entitled to on the showing made by the affidavits, and such order should be signed, filed and entered by the clerk. No formal motion in writing is required in those applications which are made and granted of course.

### §448. Special Motions and Petitions.

All special motions and petitions (except motions for continuances and motions to strike from the calendar) must be in writing and signed by the attorney or counsel of the party in whose behalf they are made, and are required to set out briefly and distinctly the grounds upon which they are founded, and must be filed in the office of the clerk, together with the affidavits supporting them, on or before the day on which they are noticed for argument.[1] Notice of argument of such special motions and petitions as require notice, together with a copy thereof and of the affidavits on which they are based, must be served upon the opposite attorney at least four days prior to the time noticed for hearing the same, but upon good cause shown the court may hear the argument on shorter notice.[2] Motions and petitions which cannot be heard on the day for which they are noticed will stand continued from day to day, in the absence of a special order, without any special order of continuance. Not more than one counsel will be heard on each side on the argument of any motion or petition, and the mover is entitled to open the argument and to reply to the argument of opposing counsel.[3] The provisions of the rule requiring four days notice of special motions and requiring such motions to be in writing are applicable to motions to extend the time for settling a bill of exceptions in a law case, and a case on appeal in a chancery case.[4] In such cases the court has no authority to extend the time for more than eighty days after judgment, unless the party applying for such extension has complied with the requirements of this rule.[5] The notice and showing required by the rule may be waived.[6]

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[1] C. C. Rules, 1916, No. 15, Sec. 1; Cummins & Beecher's Mich. Rule Book, p. 577.

[2] C. C. Rules, 1916, No. 15, Sec. 2; Cummins & Beecher's Mich. Rule Book, p. 577.

[3] C. C. Rules, 1916, No. 15, Sec. 3-4; Cummins & Beecher's Mich. Rule Book, p. 578.

[4] Burgess v. Circuit Judge, 171 Mich. 583, 137 N. W. R. 247.

### §449. Motions—Framing Issues on Hearing.

It appears to be well settled that disputed questions of fact, as a general rule, will not be tried on affidavits,[7] but questions pertaining merely to the mode of procedure, and those matters which depend on the discretion of the court, may as a general rule be tried in that manner.[8] Where a special motion involves disputed questions of fact and pertains to matters which are not discretionary with the court, the court, in its discretion, may direct an issue to be framed on the hearing.[9] Since the enactment of the Judicature Act of 1915, which abolishes pleas in abatement and pleas to the jurisdiction, as well as pleas in chancery cases and demurrers, and provides that those questions which, under the former practice, were required to be presented by plea shall now be raised by motion to dismiss, it would seem that there is more reason for framing issues on special motions than formerly.

### §450. Witnesses on Hearing of Motions.

The Judicature Act of 1915 provides that "upon the hearing of any motion or petition, when any question of fact is involved, the court hearing such motion or petition may, in its discretion, if it deems it necessary in order to reach a just conclusion as to such facts, require the production of all or any of the witnesses having knowledge of the matters of fact involved on such motion before him in open court."[10] In case the facts set forth in the affidavits or petition on which a special motion is based are denied by affidavit or answer by the party against whom such motion is made, the court before which the motion is pending may, in its discretion, frame an issue and require all or any of the witnesses having knowledge of such facts to testify orally in open court. Ordinarily the court will not frame such issue, nor require the oral examination of the witnesses in open court, except in those cases where the relief sought is mandatory and not within the discretion of the court and depends upon the facts involved in the motion. By a statute which has been in force many years in this state, it is provided that "whenever a suggestion has been made upon the record, or in any stage of the proceedings in any cause, which the adverse party shall have the right to controvert, a copy of such suggestion shall be served upon the adverse party or his attorney in the same manner as other pleadings, and such party may plead thereto according to the practice of the court, in the same manner and within the same time as to a declaration. If an issue of fact be joined on any such suggestion, the same shall be tried and judgment rendered therein as on other issues. The party making such suggestion may be non-suited and may have judgment of *non-pros.* or discontinuance entered against him for the same causes and in the same cases as in suits at law."[11]

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[5] Hill v. Hill, 114 Mich. 594, 72 N. W. R. 597; Lake Shore Rail Road Co. v. Circuit Judge, 116 Mich. 399, 74 N. W. R. 529; Roach v. Circuit Judge, 117 Mich. 242, 75 N. W. R. 465; Singer v. Livingston Circuit Judge, 117 Mich. 318, 75 N. W. R. 609; Hayes v. Ionia Circuit Judge, 125 Mich. 277, 84 N. W. R. 141; Kaiser v. Hosmer, 162 Mich. 247, 127 N. W. R. 336; Pettinger v. Montmorency Circuit Judge, 164 Mich. 463, 129 N. W. R. 676; Burgess v. Mandell, 171 Mich. 583, 137 N. W. R. 247.

[6] Wilkins v. Circuit Judge, 125 Mich. 628, 84 N. W. R. 1107; Culver v. Circuit Judge, 141 Mich. 644, 105 N. W. R. 139, Burgess v. Mandell, 171 Mich. 588, 137 N. W. R. 247.

[7] Brown v. Thompson, 29 Mich. 72; Lyon v. Smith, 66 Mich. 676, 33 N. W. R. 753; Voight Brewery Co. v. Circuit Judge, 103 Mich. 190, 61 N. W. R. 343; Sherrill v. Grand Trunk Railway Co., 161 Mich. 495, 126 N. W. R. 830.

[8] Parker v. Circuit Judge, 24 Mich. 408; Grand Rapids and Indiana R. R. Co. v. Circuit Judge, 159 Mich. 210, 123 N. W. R. 591.

[9] Haywood v. Johnson, 41 Mich. 598, 2 N. W. R. 926; Stringer v. Dean, 61 Mich. 196, 27 N. W. R. 886; Turner v. St. Clair Tunnel Co., 102 Mich. 574, 61 N. W. R. 72.

The suggestion contemplated by this statute is a statement formally entered on the record of some fact or circumstance which will materially affect the further proceedings in the case but which for some reason cannot be pleaded. It has been held that a special motion, where it is based upon a statement of facts which the adverse party is entitled to controvert and which for any reason cannot be pleaded, comes within the terms of this statute.[12] Under the new practice provided for by the Judicature Act, all dilatory pleas having been abolished, an issue undoubtedly may be framed under a motion to dismiss made before answer, or, in case a question which might have been raised heretofore by dilatory plea in a law case shall be raised in the notice attached to the plea, or in a chancery case by the answer, then such issue may be framed and brought on for hearing and determination by the court in advance of the trial on the merits.[13] And under the new practice the issue which may be so framed may be tried by the court, under the provisions of the section of the statute last cited, or, if it be such an issue as is mentioned in the statute, an order of reference may be made upon motion, under the provisions of another statute, also re-enacted as part of the Judicature Act, which provides that "when a question of fact other than upon the pleadings shall arise upon motion or otherwise, either before or after judgment, the circuit judge in vacation, by an order under his hand, may direct a reference on the written application of either party."[14]

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[10] C. L. 1915, (12577); Cummins & Beecher's Mich. Judicature Act, §700.

[11] C. L. 1915, (12762); Howell, 2nd ed. §13116 et seq, J. A. 1915, Ch. 20, Sec. 26 et seq, Page 148.

[12] Hubbel v. McKinnon, 22 D. L. N. 431; Haywood v. Johnson, 41 Mich. 598, 2 N. W. R. 670; Muskegon Booming Co. v. Circuit Judge, 97 Mich. 622, 57 N. W. R. 190; Turner v. St. Clair Tunnel Co., 102 Mich. 574, and note, 61 N. W. R. 72; Caille Bros. Co. v. Saginaw Circuit Judge, 155 Mich. 480, 120 N. W. R. 6; Grand Rapids and Indiana R. R. Co. v. Circuit Judge, 161 Mich. 181, 126 N. W. R. 56; Foley v. Grand Rapids and Indiana R. R. Co., 168 Mich. 496, 134 N. W. R. 446.

The Judicature Act by the next section provides for the practice before the referee, giving to such referee the power to administer oaths, to issue process to compel the attendance of witnesses, to grant continuances, and to conduct the proceedings generally; and after hearing the proofs to report to the court in writing, showing separately the facts found and his conclusions of law.[15]

## §451. Common and Special Orders.

All orders to which a party is entitled of course according to the rules and practice of the court, without showing special cause, are called common orders. All common orders and all orders entered by consent of the parties may be filed with the clerk of the court at any time, as well in vacation as during term, and the day when the order is filed must be noted thereon. A party may file such order as he may conceive himself to be entitled to, but at his peril. The most usual common orders in divorce cases are orders *pro confesso.* Since the adoption of the Judicature Act requiring proofs in chancery cases to be taken in open court unless otherwise directed by the Court, orders of reference to a commissioner to take proofs and report his opinion thereon to the court, which formerly were classed as common orders, under the new practice should be denominated special orders, because they can now be made only on special application to the court.

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[13] C. L. 1915, (12641); Cummins & Beecher's Mich. Judicature Act, §764.

[14] C. L. 1915, (12640); Howell, 2nd ed. §12742, J. A. 1915, Ch. 18, Sec. 68, Page 124.

[15] C. L. 1915, (12641); Cummins & Beecher's Mich. Judicature Act, §764. Hollands v. Circuit Judge, 117 Mich. 326, 75 N. W. R. 886; Church v. Anti Kalsomine Co., 118 Mich. 219, 76 N. W. R. 383.

All orders which are made on special application to the court and by its direction must be signed by the judge of the court, filed with the clerk, and entered in the proceedings of the court. All orders made by the judge at chambers must be signed by him and filed in the cause.[16]

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[16] C. C. Rules, 1916, No. 17; Cummins & Beecher's Mich. Rule Book, p. 579.

## CHAPTER XXXIX.

## HEARING AND DECREE.

§452. Jury Trials in Divorce and Annulment Cases.
§453. Proofs in Divorce and Annulment Cases:—When and How Taken.
§454. Notice of Hearing not necessary.
§455. Cross-Examination of Opposite Party.
§456. Witnesses:—Compelling Attendance and Testimony.
§457. Warrant for Apprehension of Delinquent Witness.
§458. Mode of Administering Oath to Witnesses.
§459. Competency of Witness—Religious Opinions.
§460. Competency of Witness:—Appreciation of Nature and Obligation of Oath.
§461. Children as Witnesses.
§462. Conviction of Crime.
§463. Admissibility of Testimony.
§464. Court to Rule on All Objections.
§465. Argument of Divorce Cases.
§466. Decree:—Preparing and Settling.
§467. Rehearing:—Application for.
§468. Enrollment of Decree.
§469. Discharge and Satisfaction of Decree.
§470. Enforcement of Decree.

### §452. Jury Trials in Divorce and Annulment Cases.

The statute provides that suits for divorce or to annul or affirm a marriage shall be conducted in the same manner as other chancery cases.[1] This being true, the court may award issues to be tried by a jury, in the same manner and with the same effect as in other chancery suits. The statute also provides that all issues upon the legality of a marriage (except where a marriage is sought to be annulled on the ground of the physical incapacity of one of the parties) shall be tried by a jury of the country.[2]

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[1] C. L. 1915, (11403); Howell, 2nd ed. §11464.

[2] C. L. '97, (444); Howell, 2nd ed. §11961; this statute is not mandatory upon the Court in all cases, but secures to either party the right if he chooses to exercise it, to have the issues tried by a jury. The parties will be deemed to have waived the right to a jury trial, unless one of the parties, after issue joined

But where a defendant in a divorce case denies the validity of a marriage and makes no demand or request that the issue as to the legality of the marriage be submitted to a jury, he will be deemed to have waived the right.[3] In a suit in equity to annul a marriage the circuit court has discretionary authority under this statute to grant an application for submission to a jury of the question whether the plaintiff was mentally competent to enter into the marriage contract, even though the suit has been several times noticed for hearing by the party making the application and none of the notices have mentioned a jury trial. The statute, however, is not mandatory, and the circuit judge under such circumstances may properly deny the application on the ground of waiver. The verdict contemplated by the statute is advisory only, and not binding upon the court.[4]

It has been held that it is not competent for the legislature to enact a law providing that in chancery cases either party shall be entitled to a jury trial, to be demanded in the same manner as in an action at law, and that the verdict of such jury on any question of fact shall have the same force and effect in the circuit court in chancery and in the Supreme Court on appeal as the verdict of a jury in an action at law. Such legislation has been held unconstitutional in this state.[5]

## §453. Proofs in Divorce and Annulment Cases:—When and How Taken.

In all divorce and annulment cases, whether at issue or heard on bill taken as confessed by the defendant, the testimony in support of the allegations of the bill must be taken. The court has no authority to decree a divorce or pronounce a sentence of annulment or affirmance of a marriage, on the bill being taken as confessed by the defendant, without proofs sustaining the allegations of the bill of complaint. And under the present practice such proofs must be taken in open court, as in actions at law, unless the court shall specially order

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applies to the Court for a feigned issue; Schafberg v. Schafberg, 52 Mich. 431; 18 N. W. R. 202.

This section was repealed by the Judicature Act.

[3] Schafberg v. Schafberg, 52 Mich. 429, 18 N. W. R. 202; Walker v. Circuit Judge, 112 Mich. 386, 70 N. W. R. 1032; Flannagan v. Flannagan, 122 Mich. 386, 81 N. W. R. 258.

[4] Maier v. Circuit Judge, 112 Mich. 491, 70 N. W. R. 1032.

[5] Brown v. Kalamazoo Circuit Judge, 75 Mich. 274, 42 N. W. R. 827.

otherwise.[6] No proofs can be taken, except conditionally for the purpose of perpetuating the testimony, in any divorce case until the expiration of two months from the time of filing the bill, except where the ground of divorce charged in the bill is desertion.[7] In every divorce case, whether contested or not, the court, for the furtherance of justice, may call upon either party or any witness therein to testify orally in open court, and may continue and keep the case open for that purpose, and may issue process to compel the attendance of such party or witness before the court.[8]

But no party or witness whose evidence may not be received under the laws of this state can be called upon and compelled to testify under the provisions of this rule.[9] In a divorce case one party may compel the other to testify. No privilege is conferred upon either party, permitting one to decline to take the stand as a witness upon the request of the other. But a party is not required to attend at the hearing, and if the other party desires such attendance he may procure it by the service of a subpoena for that purpose, or a deposition may be taken when necessary. When one party calls the other as a witness, he thereby consents to his testimony.[10] The testimony of the parties can be taken only in open court, and such testimony cannot be received in support or in defense of a charge of adultery.[11] The court has the power under the statute to call the defendant as a witness in a *pro confesso* divorce case.[12]

## §454. Notice of Hearing not Necessary.

Under the new practice provided by the Judicature Act of 1915 no notice of hearing of any cause is necessary. Whenever the cause is at issue, or when default is entered or filed on or before the fourteenth day prior to the first day of any term of court, it is the duty of the clerk, to place the same upon the calendar for the next ensuing term of the court, in its appropriate place, and, unless sooner tried, thereafter to place the same on the calendar for each succeeding term until it is disposed of. The causes are placed on the calendar in their proper classification in the order in which issue is joined or default entered.[13] Cases in which issue is joined or default entered after the fourteenth day before the first day of the term may be placed upon the calendar before or during the term at the request of the attorney of either party, and such causes will stand for hearing after fourteen days from the time that notice of such cause having been placed on the calendar shall have been served upon the opposite party or his attorney.[14]

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[6] C. L. 1915, (12489); Cummins & Beecher's Mich. Judicature Act, §612.

[7] C. L. 1915, (11400); Howell, 2nd ed. §11461.

[8] C. C. Rules, 1916, No. 26; Cummins & Beecher's Mich. Rule Book, p. 601.

[9] C. L. 1915, (12034); Cummins & Beecher's Mich. Judicature Act, §196.

[10] Bauer v. Bauer, 177 Mich. 169.

[11] C. L. 1915, (11428); Howell, 2nd ed. §11489.

[12] Rosecrance v. Rosecrance, 127 Mich. 322, 86 N. W. R. 800.

## §455. Cross-Examination of Opposite Party.

Either party to a divorce or annulment suit may call the other party as a witness.[15] If the plaintiff or defendant shall call the opposite party as a witness in his or her behalf, such party so called as a witness may be cross-examined by the party calling him the same as if he or she, as the case may be, had appeared as a witness in his or her own behalf, and the answers of such witness will not interfere with the right of the other party to controvert the testimony given.[16] But in such case neither the husband or wife is competent to testify if the charge made in the bill, answer, or cross-bill, for which divorce is sought, is that of adultery of either party.[17] If the plaintiff is subpoenaed as a witness in behalf of the defendant and refuses to appear, or, being present, refuses to testify when called upon to do so, except where privilege exists, the bill may be dismissed, and if the defendant has filed a cross-bill the case may proceed to a decree upon the cross-bill and answer thereto, if one has been filed. If the defendant refuses to appear on being personally served with a subpoena in behalf of the plaintiff, or, being present, refuses to be sworn or to testify, except where privileged from answering, the bill will be taken as confessed.[18] But these statutory provisions do not authorize the court to grant a decree of divorce or annulment if the bill or cross-bill is taken as confessed on account of the defendant refusing to appear and testify, nor do they in any way abrogate or modify the provisons of law with reference to punishment of witnesses for contempt of court for refusing to testify or for refusing to appear when personally served with subpoena for that purpose.

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[13] C. L. 1915, (12573); Cummins & Beecher's Mich. Judicature Act, §696.

[14] C. L. 1915, (12577); Cummins & Beecher's Mich. Judicature Act, §700.

[15] C. L. 1915, (12555); Cummins & Beecher's Mich. Judicature Act, §678.

[16] C. L. 1915, (12555); Cummins & Beecher's Mich. Judicature Act, §678.

[17] C. L. 1915, (12555); Cummins & Beecher's Mich. Judicature Act, §678.

[18] C. L. 1915, (12560); Cummins & Beecher's Mich. Judicature Act, §683.

### §456. Witnesses—Compelling Attendance and Testimony.

Witnesses may be compelled to attend the hearing or trial by personal service of a subpoena issued and signed by the clerk and under the seal of the court. In order to compel the attendance of a witness or party a subpoena must be personally served on him a reasonable time before he is required to appear. The length of time will depend to some extent upon the distance the witness will necessarily have to travel to reach the place of hearing, and the legal fees of the witness must also be paid or tendered at the time of the service unless the witness waives such payment. The legal fees of the witness are one dollar per day for attendance and ten cents per mile for traveling to the place of trial by the usually traveled route, and such traveling fees and one day's attendance must be paid or tendered to the witness at the time of service.

The manner of service is as follows:

*First;* the original writ, under the seal of the court or of the officer issuing the same, must be exhibited to the witness;

*Second;* a copy of such writ, or a ticket containing its substance, must be delivered to the witness at the time of service;

*Third;* the fees allowed by law to such witness for traveling to and returning from the place where he is required to attend and the fees allowed by law for one day's attendance must be paid or tendered to the witness at the time of service.[19]

Upon personal service and the payment or tender of his fees, the witness is required to be in attendance at the time and place stated in the writ and remain in attendance until legally excused, and he is entitled to his *per diem* fees each day he is necessarily detained in attendance. For failure to so attend and testify, without a legal and reasonable excuse, the witness will be deemed guilty of a contempt of the court out of which the subpoena issued, and will also be responsible to the aggrieved party for the damage for the loss and hindrance sustained by reason of such failure, and for all other damages sustained thereby; and in addition thereto will be liable to the aggrieved party in the sum of fifty dollars as additional damages, to be recovered in the same action with the other damages.[20]

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[19] C. L. 1915, (12561); Cummins & Beecher's Mich. Judicature Act, §684.

### §457. Warrant for Apprehension of Delinquent Witness.

Upon due proof of personal service of a subpoena and payment or tender of the legal fees of a witness and the failure of the witness to attend, the court will issue its warrant to the sheriff of the county to bring such witness before the court to be examined.[21] The proof of service of the subpoena and of the neglect or refusal of the witness to attend may be made *ex parte* by affidavit, or, if the court so directs, the proof may be made by oral testimony in open court. If a witness attending before the court in pursuance of a subpoena, or brought before the court by warrant issued by the court for that purpose, shall, without reasonable cause refuse to be examined or to answer any legal or pertinent question, the court, by its warrant, will commit such witness to the common jail of the county in which he resides, there to remain until he submits to be examined, or to answer such legal and pertinent questions as shall be put to him, or until he shall be discharged according to law.[22]

A peculiar feature of this section of the statute is that in case of the contumacious refusal of a witness to appear or testify, the court is required to commit such witness to the jail of the county in which the witness resides, even though such county may not be within the territorial jurisdiction of the court which issues the warrant of commitment. It frequently happens that witnesses are called before the courts who are residents of another state, or of a county other than those composing the territorial jurisdiction of the court. In such a case it may be doubtful whether a warrant of commitment could be executed in the foreign state or county.

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[20] C. L. 1915, (12561; Cummins & Beecher's Mich Judicature Act, §684.

[21] C. L. 1915, (12563); Cummins & Beecher's Mich. Judicature Act, §686.

[22] C. L. 1915, (12564); Cummins & Beecher's Mich Judicature Act, §687.

Such warrant of commitment must specify particularly the cause of such commitment and, if the commitment is for refusing to answer any question, such question must be stated in the warrant.[23]

A warrant to apprehend a witness who refuses to attend the court in obedience to a subpoena duly served must be directed to the sheriff of the county where such witness may be, and must be executed by him in the same manner as other process issued by courts of record.

### §458. Mode of Administering Oath to Witnesses.

The usual mode of administering an oath to a witness practiced in this state is by the person who swears holding up the right hand. The statute requires this method to be observed in all cases, except where such person is conscientiously opposed to taking an oath.[25] In such case a witness instead of swearing, may be permitted solemnly and sincerely to affirm, under the pains and penalties of perjury.[26]

### §459. Competency of Witness—Religious Opinions.

The statute provides that "no person shall be deemed incompetent as a witness in any court, matter, or proceeding, on account of his opinions on the subject of religion; nor shall any witness be questioned in relation to his opinions thereon, either before or after he shall be sworn."[27] The Constitution also provides that no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief.[28]

It has been held that this section of the constitution refers only to the competency and not to the credibility of the witnesses. [29] But the statute goes further than the constitution, and forbids questioning a witness in relation to his opinion on the subject of religion or his religious belief, either before or after he is sworn.[30] The original common law rule that in order to be a competent witness a person must believe in God and in a state of future rewards and punishments has been modified so as to admit the testimony of persons who believe in the existence of a supreme being, although not in rewards and punishments after death; and in a number of jurisdictions the common law rule is entirely abrogated by constitutional or statutory provisions, under which religious belief, or the lack of it, has no bearing whatever on the competency of a witness. In some jurisdictions the question of religious belief does not affect the competency of the witness, but it may be enquired into for the purpose of affecting the credibility of his testimony.

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[23] C. L. 1915, (12565); Cummins & Beecher's Mich. Judicature Act §688.

[24] C. L. 1915, (12566); Cummins & Beecher's Mich. Judicature Act §689.

[25] C. L. 1915, (12568); Cummins & Beecher's Mich. Judicature Act, §691.

[26] C. L. 1915, (12569); Cummins & Beecher's Mich. Judicature Act, §692.

[27] C. L. 1915, (12570); Cummins & Beecher's Mich. Judicature Act, §693. This section of the judicature act makes no change of the former statute, C. L. '97 (10207); Howell, 2nd ed. §12851.

[28] Constitution, 1908, Art 2, Sec. 17.

[29] People v. Jenness, 5 Mich. 319.

In those jurisdictions where the common law rule is entirely abrogated by constitutional provision or legislative enactment it is not competent to examine a witness as to his religious belief, either before he is sworn or afterwards, for the purpose of determining his competency, or to affect the credibility of his testimony.[31]

## §460. Competency of Witness:—Appreciation of Nature and Obligation of Oath.

In order to be competent as a witness, a person must have sufficient intelligence to understand and appreciate the obligation of the oath he takes. The purpose of the law being to lay hold on the conscience of the witness by this religious solemnity, it is obvious that persons incapable of comprehending the nature and obligation of an oath ought not to be admitted as witnesses. In their case the repetition of the words of the oath would be but an unmeaning formality. It makes no difference from what cause the defect of understanding may have arisen; nor whether it be temporary and curable or permanent; whether the party be hopelessly an idiot or maniac, or only occasionally insane, as a lunatic; or be intoxicated, or whether the defect arises from mere immaturity of intellect, as in the case of children. While the deficiency of understanding exists, be the cause of what nature soever, the person is not admissible to be sworn as a witness.[32]

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[30] Sibley v. Morse, 146 Mich. 463, 109 N. W. R. 858.

[31] *California.* Fuller v. Fuller, 17 Cal. 605.

*Florida.* Clinton v. State, 53 Fla. 98, 43 So. R. 312, 12 Ann. Cas. 150 and note.

*Georgia.* Donkel v. Cohn, 44 Ga. 266.

*Illinois.* Hroneck v. People, 134 Ill. 139, 24 N. E. R. 961, 23 Am. St. R. 652, 8 L. R. A. 837; Ewing v. Bailey, 36 Ill. App. 191.

*Indiana.* Snyder v. Nations, 5 Blachf. 295.

*Iowa.* State v. King, 117 Iowa, 484, 91 N. W. R. 768.

*Kansas.* Dickinson v. Beal, 10 Kan. App. 233, 62 Pa. R. 724.

*Kentucky.* White v. Com. 96 Ky. 180, 28 S. W. R. 340; Bush v. Com., 80 Ky. 244, 3 Ky. L. R. 740.

*Louisiana.* State v. Williams, 111 La. 179, 35 So. R. 505.

*Massachusetts.* Com. v. Burke, 16 Gray, 63.

*Michigan.* People v. Jenness, 5 Mich. 305; Sibley v. Morse, 146 Mich. 463, 109 N. W. R. 858.

*Missouri.* Londoner v. Licthenheim, 11 Mo. App. 385.

*New Jersey.* State v. Powers, 51 N. J. L. 432, 17 Atl. R. 969.

*Texas.* Colter v. State, 37 Tex. Cr. 284, 39 S. W. R. 576; Murphy v. State, 36 Tex. Cr. 24, 35 S. W. R. 174.

### §461. Children as Witnesses.

The most frequent occasion to apply the foregoing rule is in the case of young children who are called as witnesses.[33] It is universally held by the courts of this and other states that the fact that a child called as a witness is under the age of seven years does not create an absolute disability to testify.[34]

The authorities all agree that a child is not competent to testify if it is not capable of appreciating the obligation of an oath, if he takes an oath, or of his affirmation if that is substituted. This is upon the ground that a witness must be under some pressure arising out of the solemnity of the occasion beyond the ordinary obligation of telling the truth.[35] But it has been held that it is not necessary that the child should understand that the obligation to tell the truth on the witness stand is any greater than at other places.[36] It appears to be sufficient to qualify the child that he understands the difference between truth and falsehood, and that it is his duty to tell the truth,[37] and that he will be punished if he testifies falsely.[38] A child who knows that he will be punished on earth if he testifies falsely is competent, although he knows nothing of punishment after death.[39] The child need not know how, or by whom he will be punished.[40] And the fact that the child is too young to be prosecuted for perjury does not render him incompetent.[41]

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[32] 1 Greenleaf on Evidence, 15th ed., Sec. 365, Page 502. The question of the competency of the witness is for the trial judge to decide, and he may conduct the examination to determine the degree of intelligence possessed by the witness as he sees fit; Cannaday v. Lynch, 27 Minn. 435, 8 N. W. R. 164.

[33] Hughes v. Detroit, G. H. & M. R. R. Co., 65 Mich. 10, 31 N. W. R. 603; Davis v. State, 31 Neb. 247, 47 N. W. R. 854; Olson v. Olson, 130 Ia. 353, 106 N. W. R. 758; Kilburn v. Mullen, 22 Ia. 498; Lee v. R. R. Co., 76 Kan. 402, 73 Pa. R. 110, 63 L. R. A. 271.

[34] McGuire v. People, 44 Mich. 286, 6 N. W. R. 669.

[35] 1 Greenleaf Ev., 15th ed., Sec. 367; 1 Phil Ev., Ch. 2 and notes: Hughes v. Detroit, G. H. & M. R. R. Co., 65 Mich. 14, 31 N. W. R. 603.

[36] State v. Meyer, 135 Ia. 507, 113 N. W. R. 322, 124 Am. St. R. 291, 14 Ann. Cas. 1 and note.

### §462. Conviction of Crime.

The common law rule is that a person is incompetent as a witness if he has been convicted of an infamous crime,[42] such as treason, felony or any of the *crimen falsi;* but a mere conviction of crime does not render the offender incompetent if he has not thereby been rendered infamous. The common law rule has been declared by legislative enactment in some of the states, and in others it is abolished so far as the question of competency is concerned, but a conviction of crime may be shown as bearing on the credibility of the testimony given by the witness. In Michigan the statute provides that "no person shall be excluded from giving evidence in any matter, civil or criminal, by reason of crime, but conviction of crime may be shown, for the purpose of drawing in question the credibility of such witness."[44] This statute does not abrogate the common law rule entirely as to the effect of the conviction of an infamous crime on a witness, but still allows such conviction to be shown as a distinct fact, as bearing on the credit to be given to his testimony by the court or jury.[45]

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[37] State v. Washington, 44 La. Ann. 1602, 22 So. R. 841; Clark v. Finnegan, 127 Iowa, 644, 103 N. W. R. 970.

[38] Sokel v. People, 212 Ill. 238, 72 N. E. R. 382; Bright v. Com. 120, Ky. 298, 86 S. W. R. 527, 27 Ky. L. R. 677, 117 A. M. St. R. 590; Agneau v. Brooklyn City R. R. Co., 5 N. Y. Supp. 756, affirmed in 117 N. Y. 651, 22 N. E. R. 1132; Clark v. State, (Tex. Crim. 1902), 66 S. W. R. 1104.

[39] Sawado v. State, (Tex. Crim. App. 1902), 61 S. W. R. 142; Scroggins v. State, (Tex. Crim. App. 1902), 51 S. W. R. 232, *Contra* Jones v. State, 145 Ala. 51, 40 So. R. 947.

[40] Bright v. Com., 120 Ky. 298, 86 S. W. R. 527, 117 Am. St. R. 590.

[41] Johnson v. State, 61 Ga. 35.

[42] Taylor v. State, 62 Ala. 164; Werner v. State, 44 Ark. 122; State v. Clark, 60 Kan. 450, 56 Pac. R. 767; People v. Whipple, 9 Cow. (N. Y.) 707; U. S. v. Barefield, 23 Fed. R. 136.

[43] Holler v. Firth, 3 N. J. L. 723; Welsh v. State, 3 Tex. App. 114; U. S. v. Brockins, 24 Fed. R. 460, 3 Wash. 99, where no infamous punishment was inflicted, though it might have been.

[44] C. L. 1915, (12560); Howell, 2nd ed. §12854; People v. Hoffman, 154 Mich. 145, 117 N. W. R. 568.

The credit of a witness, however, cannot be impeached or assailed by the direct testimony of another witness to any criminal act committed by the witness, or to any charge of criminality, unless he has actually been adjudged guilty, and this can be shown only by a record and judgment of conviction.[46] The general rules as to the admissibility of testimony in divorce and annulment cases are the same as in any other case on the equity side of the court.

### §463. Admissibility of Testimony.

In taking the testimony in divorce cases, the general rules of law are applicable as to competency, relevancy and materiality of testimony offered. Prior to the enactment of the Judicature Act of 1915, the court on the hearing of chancery cases in open court was ordinarily required to receive all testimony offered unless it was clearly and without question incompetent, or was offered by a witness whom the law declared to be incompetent to testify in the particular case or on a particular subject. This rule was followed on the theory that inasmuch as the Supreme Court on appeal was required to hear and determine the case upon the testimony taken in the lower court, it became necessary to have all of the testimony offered taken and returned to the appellate court, where such as was found to be inadmissible could be rejected and a final decree entered without sending the case back for a new trial or hearing. The commissioners appointed to prepare and report bills for revision and consolidation of the statutes, whose careful and painstaking labor and research resulted in the passage of the Judicature Act of 1915, in their report to the governor, make use of the following language on this subject: "In the trial of chancery cases much time is taken up by the introduction of wholly immaterial and incompetent testimony. The chancery record is often made the dumping ground of things introduced purely to gratify spite or malice, or with the deliberate intent of prejudicing the court by matter known to be improper." While this statement is not very complimentary to the profession, candor compels the admission that it contains a large measure of truth.

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[45] People v. Hall, 48 Mich. 490, 12 N. W. R. 665; Helwig v. Lascowski, 82 Mich. 619, 46 N. W. R. 1033.

[46] People v. Maunausau, 60 Mich. 21, 26 N. W. R. 795; Driscoll v. People, 47 Mich. 416, 11 N. W. R. 221; Smith v. Brown, 2 Mich. 162; Dickinson v. Dustin, 21 Mich. 561.

The only reason which can be offered, or which ever has been offered, for receiving every thing offered in chancery hearings, is that in case of an appeal, if the Supreme Court should hold that testimony which has been rejected should have been received, it could not properly make a just and final disposition of the case without having such testimony before it.

## §464. Court to Rule on All Objections.

The Judicature Act of 1915 made a radical change in the matter of taking testimony in chancery cases. It provides "that in all chancery cases the court must rule upon all objections to the competency, relevancy, or materiality of testimony or evidence offered, the same as in suits at law." If the court is of the opinion that testimony offered ought not to be received, it may be excluded. The rights of the party offering such testimony are fully protected on appeal by a further provision that if the testimony offered and excluded is brief, the court, in its discretion may permit it to be taken down by the stenographer, separate from that received in the case; and, in case of an appeal, such excluded testimony may be returned to the appellate court under the certificate of the trial court. If such excluded testimony is not permitted by the trial court to be taken down by the stenographer, and on appeal the Supreme Court shall be of the opinion that such testimony is competent and has a material bearing on the issues involved, it may order the same to be taken by deposition or under a reference, and returned to that court.[47]

These provisions seem to do away with any objections which can be made to the change referred to, made by the Judicature Act, and to prevent such abuses as under the former practice sometimes occurred. Of course, if the Supreme Court, upon examination of the record, should find it necessary to direct a reference or to order such testimony to be taken by deposition, the final disposition of the case may be delayed for a short time, but that would be a trifling matter compared with going through a long record of incompetent and immaterial testimony and separating the material from the immaterial and incompetent. On the whole the change seems to be a wise one. Of course it is a radical departure from a well recognized and long established practice, but it is a salutary preventive of an evil of just as long existence.

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[47] C. L. 1915, (12493); Cummins & Beecher's Mich. Judicature Act, §616.

### §465. Argument of Divorce Cases.

When the proofs are closed on the hearing of a divorce or annulment case oral arguments may be made upon the questions of law and fact involved, by counsel for the respective parties. Upon the issues of fact raised by the bill and answer, the attorney for the plaintiff has the right to make the opening and closing argument. If a cross-bill has been filed by the defendant and answered by the plaintiff, the issues so raised are argued at the same time, and may be presented to the court in connection with those issues which are raised by the original bill and the answer thereto. If no testimony has been offered in support of the allegations of the cross-bill it will be treated as abandoned by the defendant, and the argument confined to the questions raised by the original bill and answer, concerning which testimony has been given. No more than two hours is allowed either side for argument unless otherwise directed by the court, and the court in its discretion may limit the time to less than two hours, but counsel may have at least one-half hour on each side if they so desire.[48]

### §466. Decree:—Preparing and Settling.

After the arguments of counsel are concluded the cause is submitted to the court for its decision. When the decision of the court is announced, either orally in open court or by written findings filed with the clerk, a formal decree should be prepared by counsel for settlement and signature by the judge who heard the cause. Counsel for the party in whose favor the decision is made should prepare the decree in accordance with the findings of the court, and should serve a copy on counsel for the opposite party, together with a notice of the time when, and the place where, the same will be presented to the judge for settlement and signature. At least four days notice should be given of the time and place of settling the decree. Amendments to the proposed decree may be prepared and submitted to the trial judge for allowance, and when the terms of the decree are settled it should be neatly and carefully engrossed, signed by the judge, and filed with the clerk of the court.

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[48] C. C. Rules, 1916, No. 42, Sec. 2; Cummins & Beecher's Mich. Rule Book, p. 620.

### §467. Application for Rehearing.

An application for a rehearing may be had in divorce actions under the same conditions and terms as in other equitable actions, on proper cause shown. No application for a rehearing can be heard unless made within four months from the time of the entry of the final decree. The application may be made by special motion or petition, and the special matter or cause on which the rehearing is applied for and the particular points in which the decree or order is alleged to be erroneous must be fully set forth in the motion or petition. If the matters of fact stated in the motion or petition do not appear from the records of the court, they must be verified by the oath of the party or some other person having personal knowledge of such facts.[49] Clerical mistakes in a decree or decretal order, or errors arising from any accidental slip or omission, may be corrected at any time within three months after such decree is entered, by the order of the court or a judge thereof without the form or expense of a rehearing.[50] If a rehearing is granted the petitioner will lose the benefit of the order granting it unless within ten days after such order is entered he shall deposit with the clerk the sum of fifty dollars, or such additional reasonable sum as the court may from time to time order, to answer the costs and damages of the adverse party if the decree or order shall not be materially changed.[51]

The order granting the rehearing should state the amount, not less than fifty dollars, which the petitioner is required to deposit with the clerk, and the court thereafter may order such additional amount to be deposited for the same purpose as may be found to be necessary. The first deposit must not be less than fifty dollars. After that the additional amounts required are in the discretion of the court. These provisions of Rule No. 56 of the new rules promulgated by the Supreme Court very materially change the practice in relation to rehearings and bills of review, but the principles laid down in former decisions still apply.

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[49] C. C. Rules, 1916, No. 56, Sec. 1-2; Cummins & Beechers Mich. Rule Book, p. 640.

[50] C. C. Rules, 1916, No. 56, Sec. 3; Cummins & Beecher's Mich. Rule Book, p. 640.

[51] C. C. Rules, 1916, No. 56, Sec. 4; Cummins & Beecher's Mich. Rule Book, p. 640.

If the facts upon which the petitioner bases his right to a rehearing were known to him or by the exercise of reasonable diligence might have been ascertained at the time of the first hearing, a rehearing will be denied.[52]

An application for a rehearing based upon facts which already appear on the record and that would not materially alter or add to the case made on the first hearing will be denied.[53] A rehearing will not be granted on the ground of newly discovered evidence where the statement of the new evidence is vague and indicates nothing more than cumulative testimony upon a subject on which several witnesses were examined and testified on the first hearing.[54]

## §468. Enrollment of Decree.

After the expiration of twenty days from the time the final decree is entered, such decree should be enrolled by the clerk of the court, if at that time no appeal has been claimed and no petition for a rehearing presented. This is done by attaching together the bill, pleadings, and such other papers in the cause as may have been from time to time filed therein, in accordance with the rules and practice of the court, together with the taxed bill of costs, if any, and the final decree or decretal order signed by the judge and countersigned by the clerk.[55]

Before the passage of the Judicature Act, the clerk was not required to enroll the decree until requested to do so by one of the parties, but the statute now requires such enrollment without such request after the expiration of twenty days, if no appeal has been claimed and no application for a rehearing made. In preparing papers for filing in chancery cases, care should be taken to leave a top margin wide enough so that the writing will not be obscured by enrollment. When the decree has been enrolled the clerk is required to annex thereto his certificate, under the seal of the court, certifying according to the fact the time when such papers were so attached for the purpose of enrollment, and the name or names of the parties at whose instance the same was done. Such decree and papers so enrolled are then filed by the clerk and remain a record in his office.[56] If a decree affects or determines the title to real estate, a copy thereof duly certified by the clerk of the court in which the same is entered, under the seal of the court, may be received and recorded in the office of the register of deeds of the proper county after entry and enrollment. Such copy, or the record thereof, will have the same force as evidence of the facts therein contained as the original decree. If such decree directs the execution of a conveyance or other instrument affecting the title to real estate, the record of such enrolled certified copy of the decree will have the same effect as the execution of such conveyance or other instrument would have if duly executed in pursuance of said order or decree.[57] In all divorce cases where the final decree directs one of the parties to convey real estate to the other, or declares a lien on real estate to secure the payment of a sum of money, the decree should be properly enrolled and recorded in the office of the register of deeds of the county in which the land is situated.

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[52] Sherwood v. Bank, 104 Mich. 65, 62 N. W. R. 294; Ryerson v. Eldred, 18 Mich. 390.

[53] Taylor v. Boardman, 24 Mich. 287.

[54] Case v. Case, 26 Mich. 485; Detroit, Savings Bank v. Truesdail, 38 Mich. 430.

[55] C. L. 1915, (12805); Cummins & Beecher's Mich Judicature Act, §928.

## §469. Discharge and Satisfaction of Decree.

If the decree in a divorce case goes no farther than to dissolve the marriage, manifestly no satisfaction or discharge of such decree is necessary to be filed or entered.

If, however, the decree provides for the payment of a sum of money as costs and expenses of the suit, or as alimony, or the performance of any other specified act, when full performance has been made and had a satisfaction and discharge of the decree should be entered.

Such discharge and satisfaction is accomplished by the party in favor of whom the decree was entered signing a written acknowledgment that he has been fully paid the amount of all money directed by said decree to be paid, and has received full performance and satisfaction of all things directed by said decree to be done or performed. This acknowledgment must be signed, acknowledged and certified to before and by some officer authorized to take acknowledgments, and filed in the office of the clerk of the court. Upon the filing of such acknowledgment the clerk is required to enter in the docket of such decree a note of the satisfaction and discharge thereof.[58] The court also has power to order a decree to be discharged upon a hearing of the parties and upon satisfactory evidence that the same has been fully paid or satisfied.[59]

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[56] C. L. 1915, (12806); Cummins & Beecher's Mich. Judicature Act, §929.

[57] C. L. 1916, (12807); Cummins & Beecher's Mich. Judicature Act, §930.

If the decree has been fully paid and all of its conditions performed and complied with, and the party who has received such payment or performance refuses to sign and acknowledge a discharge of the same, or for any reason such discharge and satisfaction cannot be procured, application should be made to the Court by special motion or petition for an order of discharge and satisfaction thereof.

## §470. Enforcement of Decree.

Performance of or obedience to any final decree of a court of chancery may be enforced by execution against the body of the party against whom such decree shall have been made, or by execution against the goods and chattels of such party,[60] and, in default thereof, his lands and tenements. The decree must be enrolled before any execution can issue against the body, or against the lands and tenements or goods and chattels of the party, and such enrollment must include all of the papers filed in the case. If the decree authorizes the sale of real estate, notice of such sale may be given in advance of such enrollment, but no conveyance on such sale can be executed by a commissioner or other officer until such enrollment is had.[61]

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[58] C. L. 1915, (12808); Cummins & Beecher's Mich. Judicature Act, §931.

[59] C. L. 1915, (12809); Cummins & Beecher's Mich. Judicature Act, §932.

[60] C. L. 1915, (12965); Cummins & Beecher's Mich. Judicature Act §1088.

[61] C. C. Rules, 1916, No. 55; Cummins & Beecher's Mich Rule Book, p. 639. C. L. 1915, (12965); Cummins & Beecher's Mich. Judicature Act, §1088.

## CHAPTER XL.

# POWERS AND DUTIES OF PROSECUTING ATTORNEYS IN DIVORCE CASES.

§471. Reason for Public Representation.
§472. General Legislation.
§473. Michigan Statutory Provisions.
§474. Duty on being Served with Summons.
§475. Subjects of Investigation.
§476. Prosecutor not Disqualified to Act for Either Party.
§477. Compensation for Services.

### §471. Reason for Public Representation.

All divorce and annulment cases are of a quasi public character, in which it has generally come to be understood that public policy requires the adoption of some means for the protection of the public against such evils as would be likely to arise by an ill-advised dissolution of the marriage tie. Especially is this true where it is sought to dissolve a marriage which has resulted in bringing children into existence, who, in the tender years of their lives, are in need of such care and protection as can be afforded only in a well-ordered home of their parents.

But the necessity for representation of the public interests in such cases is not by any means confined to the interests and welfare of children. A wise public policy forbids divorces procured by collusion between the parties. The marriage relation, which lies at the very foundation of civilized society, should not be lightly regarded nor carelessly dealt with.

Notwithstanding some modern legislation and ancient and modern decisions declaring marriage to be a civil contract between the parties, it appears to be universally recognized that it is also in the nature of a contract between the parties and the state, acknowledging certain duties and obligations to the public. In many of the states this view is recognized in legislation requiring the appearance in divorce cases of some public official upon whom is imposed the duty of looking after and protecting the interests of the public.

### §472. General Legislation.

In the District of Columbia, by act of congress, the United States attorney must be served with process, and must enter an appearance in the cause in all divorce cases and defend and protect the rights of the public.[1]

In Idaho prosecuting attorneys are required to appear for the state and defend in all default divorce cases.[2] In Illinois the prosecuting attorney must defend all default actions for divorce.[3] In Indiana the statute requires the public prosecutor to resist all undefended applications for divorce.[4] In Kentucky the court must appoint an attorney to defend in all uncontested divorce actions.[5] In Oregon service must be made upon the district attorney, who must defend on behalf of the state in all divorce cases.[6] In Utah the prosecuting attorney must defend for the state in all divorce cases.[7] In Washington the prosecuting attorney must defend all uncontested divorce cases for the state.[8] In Wisconsin the prosecuting attorney must resist all undefended applications for divorce.[9]

Many other states have statutes of a somewhat similar character, and it may be said that the modern trend of legislation in the United States is in the direction of affording some means of protection of public rights and public policy in divorce litigation. It has been said that in all divorce cases there are three parties in interest, the plaintiff, the defendant, and the public. This is unquestionably true, but in many cases there are fourth parties; young children, whose rights and interests are equally important, and many times more in need of public supervision and protection.

### §473. Michigan Statutory Provisions.

In Michigan the legislature seems to have recognized the necessity of protecting the interests of children by providing that in all applications for divorce the names and ages of all children of the marriage must be stated in the bill of complaint, and, where any of such children are under the age of fourteen years, a copy of the summons by which the action is instituted must be served upon the prosecuting attorney of the county in which the action is pending.[10]

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[1] District of Columbia Code, 1905.

[2] Revised Laws of Idaho, 1908, Laws of 1915.

[3] Revised Statutes of Illinois, 1913.

[4] Burns Annotated Statutes of Indiana, 1908.

[5] Revised Statutes of Kentucky, 1909.

[6] Lord's Oregon Laws, 1911-1913.

[7] Compiled Laws of Utah, 1907, Session Laws, 1913.

[8] Washington Revised Code and Statutes, 1910.

[9] Revised Statutes of Wisconsin, 1913.

This statute appears to be mandatory to the extent that where there are children of the marriage under the age of fourteen years and their names and ages are not stated in the bill of complaint and no copy of the summons is served on the proper prosecuting attorney, a decree of divorce rendered upon such application would be void, or at least voidable.

### §474. Duty on being Served with Summons.

Upon being served with a copy of the summons in a divorce case where there are children of the marriage under the age of fourteen years, it is the positive duty of the prosecuting attorney to enter an appearance in the cause, and he should serve notice of such appearance on the attorney for the plaintiff, and, if, in his judgment, the interests of the children or the public good so require, he must appear at the hearing, introduce evidence, and oppose the granting of a decree of divorce. And in any case, wherein there are no children, the issue of such marriage, under the age of fourteen years, when it shall appear to the court that the public good so requires, the court may enter an order requiring the prosecuting attorney to appear and oppose the granting of a decree of divorce. Failure to serve the summons on the prosecuting attorney and his non-appearance in a case where there are minor children will not affect the jurisdiction of the court, and are mere irregularities. Where the interests of the children have been fully protected, a divorce will not be disturbed for such reason.[11]

This statute does not contemplate a mere *pro forma* appearance at the taking of the testimony of the parties and an examination of their witnesses in order to see if he will oppose a decree, but a real and *bona fide* contest, upon evidence introduced for the purpose of showing that the interests of the children require that a divorce should not be granted.[12] And in any case in which the court makes an order requiring the prosecuting attorney to appear and oppose the granting of a decree of divorce, it is equally his duty to oppose the granting of such decree, in good faith, by introducing testimony, if the circumstances of the case warrant it, to show that the interests of the public, or the public welfare, require that no decree of divorce be granted in the particular case.

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[10] Mich. C. L. '15, (11433); How. 2nd. Ed., Sec. 11494.

[11] C. L. '15, (11433); How. 2nd. Ed., Sec. 11494; Cole v. Cole, 160 N. W. 418.

[12] Wilcox v. Circuit Judge, 83 Mich. 5, 47 N. W. R. 29.

Of course it is not to be expected that the prosecuting attorney will find it necessary in all cases to make a contest, but to enable him to exercise his judgment and come to an intelligent determination as to whether the interests of the children, or the public good, require that a contest should be made, it is necessary that he should make a proper and thorough examination and investigation to obtain information and facts upon which to base his judgment. Upon being served with a summons, or being notified of the order of the court requiring it, he should file and serve notice of his appearance in the case. This secures to him a copy of the bill and the right to notice of all subsequent proceedings. Upon receiving a copy of the bill he should make the same thorough investigation and examination of all of the circumstances in the case that he would in any other case where public or private interests are involved, and from such investigation determine whether a defense should be made, either in behalf of the public good or in the interests of the children. The provisions of this statute are mandatory and were enacted to furnish a remedy for, or rather preventive of, a recognized evil, and they should be scrupulously observed and obeyed.

A practice seems to have grown up, and to some extent to prevail in some jurisdictions, by which the prosecuting attorney, when served with a summons in such cases, simply makes a report in writing to the court, when requested to do so by the plaintiff's attorney, without having entered any formal appearance or procured a copy of the bill, and in some cases having made no investigation, or merely a *pro forma* one, upon which he reports that in his judgment neither the interests of the children nor the public good require him to oppose a decree. Whatever may be the effect of proceedings of that character upon the validity of a decree of divorce, we have no hesitation in saying that the prosecuting attorney does not do his duty unless the statute is substantially followed. The marriage relation is of such an intimate and delicate nature, and the public good, as well as the welfare of the children, are so closely connected with its preservation or dissolution, that the legislature has wisely seen fit to make it the positive duty of a public officer to investigate in certain cases. The statute is mandatory upon the prosecuting attorney, and he should comply substantially at least with its provisions whenever it becomes his duty to intervene.[13] In the course of his investigation he may examine the parties and their witnesses with a view of determining the advisability of making a defense, and in many cases, or in perhaps nearly all, such examination may be the best and sometimes the only means of obtaining the necessary information. If the parties or their witnesses decline to give him the information he desires, that fact alone may be a sufficient reason for his appearance at court at the time of the hearing, where he will have an opportunity to examine the witnesses and invoke the aid of the court, if necessary, to compel the parties or either of them to appear and testify in open court. True, he cannot compel the witnesses to appear and testify before himself, but if, when requested to do so, the parties or their witnesses decline or refuse to be interviewed by him, or refuse to give him the necessary information, that fact may well be treated as raising a strong suspicion of collusion and afford ample reason for the prosecutor to appear before the court, compel the attendance of the parties, and subject them to a rigid examination.

### §475. Subjects of Investigation.

The statute does not point out the particular subjects which the prosecuting attorney is required to investigate. It simply requires him to make such an investigation as will enable him to determine whether, in his judgment, the interests of the children or the public good require that a defense should be made. This is an official duty which he has no right to evade or neglect. The legislature, in the exercise of its authority for the furtherance of a wise public policy, has enacted that no collusive divorces shall be granted by the courts. The large number and rapid increase of uncontested divorce cases in the country leave room for the inference that a large percentage of them are more or less the result of collusion between the parties. The provision of the statute that a person making application for a divorce must swear that there is no collusion, understanding or agreement between the parties in regard to such application is easily evaded and does not seem to accomplish the object or purpose for which it was evidently intended. Hence, when the prosecuting attorney is called upon by force of the statute or order of the court to appear in a case, it is his positive duty to make a thorough investigation to satisfy himself whether such collusion exists, and if he has reasonable ground to believe that it does exist, it is his duty to contest the application. He should also ascertain the number and age of the children of the marriage, what means will be afforded for their care, training, education and support in case the marriage is dissolved and their home broken up; and if in his judgment their interests will be seriously jeopardized by a dissolution of the marriage, he should use all reasonable efforts in opposition to the application. In the discharge of the duty imposed upon him by the statute under consideration, he is vested with a personal discretion as a minister of justice, and not as a mere legal attorney, and he must act impartially. He must guard the real interests of the public as well as those of young children regardless of the desires of the plaintiff or the defendant; and he must not become entangled with the private interests of the parties, nor their grievances.

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[13] Wilcox v. Circuit Judge, 83 Mich. 1, 47 N. W. R. 29.

### §476. Prosecutor not Disqualified to Act for Either Party.

Unlike the general laws of the state defining and regulating the duties of prosecuting attorneys, this statute does not prevent them from acting as attorney or counsel for either party in a divorce case, but if they are retained as such their obligations and duties as ministers of justice in the particular case cease, and the court is charged with the duty of appointing some reputable attorney to perform such services as the prosecuting attorney would have been required to perform if he had not been retained by one of the parties in the case; and such appointed attorney is entitled the same compensation as the statute provides for similar services by the prosecuting attorney. Under this statute it is the positive duty of the court, in every divorce case where there are children of the marriage under the age of fourteen years, to appoint an attorney to represent the children and the public if the prosecuting attorney of the county is retained by one of the parties to the action. This duty sometimes appears to be overlooked. It ought not to be, however, for if the interests of the public and of young children are such that they need the supervision and protection of a disinterested public official, and that duty is laid upon the prosecuting attorney of the county, he ought not to be permitted to accept a private retainer in those cases where it is his statutory duty to represent the public interests; and in case he is permitted to do so, some disinterested attorney ought in all cases to be appointed, and the court has power to see that the duties of such appointment are faithfully performed.

## §477. Compensation for Services.

The statute provides for the payment to the prosecuting attorney, or to the attorney appointed by the court to perform his duties where he has accepted a retainer from one of the parties, the pitifully small sum of five dollars, for services which if performed for private interests would be compensated by many times that sum. This fact is certainly not a very great inducement to the performance of services which are generally regarded as of only a quasi public character, as thoroughly as the real necessities of the occasion may demand. The other duties which the general laws of the state impose upon prosecuting attorneys, and for which in most counties they receive ridiculously small salaries compared with the amount of work they are required to do, are many and complicated, and in most counties, if properly performed, occupy the entire time and attention of the public prosecutor. This, however, affords no excuse for neglect or indifference in the performance of those official duties which this statute imposes, and which are assumed by the public prosecutor when he accepts his official position.

# CHAPTER XLI.

## APPEALS TO SUPREME COURT.

§478. Who may Appeal.
§479. Claim of Appeal.
§480. Extension of Time for Appeal.
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§482. Evidence—How Settled.
§483. Method of Settling the Evidence for Review.
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§497. Contents and Service of Briefs.
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§499. Taxation of Costs.
§500. Application for Rehearing—Costs.

### §478. Who may Appeal.

Any plaintiff or defendant who conceives himself aggrieved by an order sustaining or overruling any motion to dismiss, based on jurisdictional grounds or on issues which under the former practice would have been raised by demurrer, plea to the jurisdiction or other dilatory plea, or by the decree or final order of the circuit court in chancery in any cause, may appeal to the Supreme Court.

If an appeal is taken from an order sustaining or overruling a motion to dismiss, upon the decision thereof by the Supreme Court the cause will be remanded to the circuit court in chancery, and the plaintiff may amend his bill of complaint, or the defendant may file his answer, as the case may be, within such time as the order of the Supreme Court remanding the case may prescribe, and the case will then be disposed of as though no appeal had been taken.

Where there are two or more defendants and all do not move to dismiss, the proceedings as to those who do not join in the motion to dismiss or in the appeal will be stayed, except as to filing and serving pleadings, until the motion is finally disposed of. No appeal will lie from an order denying a motion to dismiss, except upon an order signed by a justice of the Supreme Court allowing such appeal; but such appeal will be allowed unless the justice or justices of the Supreme Court who consider the application shall affirmatively determine that the petition for the allowance of such appeal does not present a meritorious question.[1]

## §479. Claim of Appeal.

If an appeal is to be taken from an order sustaining a motion to dismiss, or from a final decree after a hearing on the merits, on pleadings or pleadings and proofs, a written claim of appeal must be filed with the clerk of the court where such order or decree was entered, within twenty days after the entry of such order or decree, and within the same time the party claiming the appeal must pay a fee of five dollars to the clerk. When such order or decree is entered in vacation the time for taking an appeal is computed from the time of serving notice of such decree or order.[2]

If the appeal is to be taken from an order denying or overruling a motion to dismiss, a written claim of appeal must be filed with the clerk of the court where such order or decree was entered within the same time, and an application made to a justice of the Supreme Court for an order allowing an appeal.[3] Such application should be by petition, verified by the oath of the party or of some one in his behalf. The petition should recite the names of the parties to the suit and of the party or parties claiming the right to appeal, with the substance of the decree and the date it was entered. The statute does not prescribe the form or contents either of the claim of appeal or of the petition to the Supreme Court for an order allowing an appeal. The claim of appeal should be entitled in the court and cause, and should state briefly the grounds upon which an appeal is claimed. It should be signed by all of the parties who claim the benefit of an appeal, and a copy should be served on counsel for all of the parties who do not join in the claim of appeal, whether plaintiffs or defendants.

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[1] C. L. 1915, (13753); P. A. 1915, Act No. 314, Ch. 50, Sec. 18, page 336; Cummins & Beecher's Mich. Judicature Act, §1875.

[2] C. L. 1915, (13754); P. A. 1915, Act No. 314, Ch. 50, Sec. 19, page 337; Cummins & Beecher's Mich. Judicature Act, §1876.

[3] C. L. 1915, (13753); P. A. 1915, Act No. 314, Ch. 50, Sec. 18, page 337; Cummins & Beecher's Mich. Judicature Act, §1875.

## §480. Extension of Time for Appeal.

The court in which such decree or order was entered, or the judge thereof at chambers, or any justice of the Supreme Court, upon cause shown and notice to the opposite party, may extend the time for taking and perfecting such appeal not more than one year from the date of the order or decree appealed from. If the party claiming the appeal has been prevented by circumstances beyond his control from taking and perfecting the same within the period of one year from the date of the entry of such order or decree, the Supreme Court, or one of the justices of that court, at chambers, may grant a further extension of time, not exceeding six months, for taking and perfecting such appeal. Such extension can be granted only on special motion after notice to the opposite party, and upon a proper showing.[4]

## §481. Bond to Stay Proceedings.

An appeal in a chancery case does not operate to stay proceedings in the suit unless the party taking the appeal shall, within the time allowed for perfecting the same, file with the clerk of the court in which the order or decree appealed from was entered, a bond to the appellee or appellees, with one or more sureties to be approved by the circuit judge, or a circuit court commissioner of the county, or a justice of the Supreme Court. The penalty of such bond is fixed by the judge or commissioner who approves the same, and it must be conditioned for the performance or satisfaction of the final order or decree of the Supreme Court in the cause, and the payment of all costs of the appellee or appellees in the matter of the appeal. Notice of the application for the approval of such bond must be given to the appellee the same as on special motions, and such notice must state the penalty of the proposed bond, the names of the sureties therein, and the appellee may be heard as to the sufficiency of the penalty and the responsibility of the sureties. In case such bond has been approved by a circuit court commissioner, the circuit court in which such order or decree was entered, or the judge of such court at chambers, may on motion order an additional bond and fix the penalty thereof and approve the sureties therein. The Supreme Court, or any justice thereof, may also on motion, and a proper showing, order an additional bond after an appeal has been perfected, and fix the penalty thereof and approve the sureties therein.[5] If an appeal bond is not filed the proceedings in the lower court will not be stayed, and the opposite party may proceed, at his peril however, to enforce the decree as he understands his rights under its terms.[6]

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[4] C. L. 1915, (13755); P. A. 1915, Act No. 314, Ch. 50, Sec. 20, page 337; Cummins & Beecher's Mich. Judicature Act, §1877.

## §482. Evidence—How Settled.

If the decree from which the appeal is to be taken was entered after a hearing on pleadings and proofs, the evidence taken and used on the hearing, whether taken in open court or before a commissioner or by deposition, or in any other manner, must be settled for review on appeal in the same manner and within the same time as is provided by law or the rules of practice for the settlement of bills of exception.[7]

The rules of practice allow a party not less than twenty days after the entry of the order or decree appealed from for the settlement of a case containing the evidence for review in the Supreme Court in a chancery case, but a stay of proceedings during such twenty days is discretionary with the court.[8] The court may grant such further reasonable time to settle such case as may be deemed proper, subject to the limitations prescribed by statute, and upon such terms and conditions as may be deemed just; but no more than sixty days further time will be granted for that purpose, except for good cause shown by affidavit on special motion, after notice to the adverse party, or on the written stipulation of the parties.[9] The statute and rules of court do not state what will constitute good cause for extending the time. That matter seems to have been left largely to the discretion of the trial judge, and he must depend largely upon the particular circumstances of each case as the same is brought before him for action and determination. If the transcript of the testimony can be obtained from the court stenographer without much delay the eighty days allowed by the rule will ordinarily give ample time to settle the case. It is the general practice, on request of counsel for either party at the time a final decree is settled and entered in a chancery case, to allow eighty days to settle a case for review in the Supreme Court. But no stay of proceedings can be ordered for such purpose for a longer period than twenty days from the time the decree was entered, unless the party applying for such stay, if a decree shall have been rendered against him, shall execute a bond to the adverse party as described in the preceding section. In case the party applying for such stay of proceedings shall be unable to give such bond by reason of poverty, the judge may, upon due proof of inability, for such reason grant such stay without requiring such bond.[10]

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[5] C. L. 1915, (13756); P. A. 1915, Act No. 314, Ch. 50, Sec. 21, page 337; Cummins & Beecher's Mich. Judicature Act, §1878.

[6] Pinel v. Pinel, 172 Mich. 611, 138 N. W. R. 219.

[7] C. L. 1915, (13757); P. A. 1915, Act No. 314, Ch. 50, Sec. 22, page 338; Cummins & Beecher's Mich. Judicature Act, §1879; Winegar v. Fritz, 164 Mich. 427, 129 N. W. R. 878; Macomber v. Cottrell, 162 Mich. 720, 127 N. W. R. 402; Commercial National Bank v. Gaukler, 164 Mich. 215, 129 N. W. R. 195; Hulan v. Circuit Judge, 159 Mich. 608, 124 N. W. R. 574.

[8] C. C. Rules, 1916, No. 66, Sec. 1; Cummins & Beecher's Mich. Rule Book, page 653.

It must be borne in mind by the practitioner that the time for filing the claim of appeal and for paying to the clerk the fee of five dollars for making the return has been changed by the Judicature Act. Formerly the claim of appeal and payment of the fee could be filed and made at any time within forty days after the settlement of the case for review in the Supreme Court. Under the new practice no material change has been made as to the time within which the case for appeal may be settled, but it should be remembered that the claim of appeal must now be made and filed with the clerk, and the fee paid and notice thereof given to the adverse party, within twenty days from the time the decree is entered.

The filing of the claim of appeal and the payment of the fee of five dollars to the clerk for making the return within the time required by the statute are jurisdictional prerequisites, and failure to comply within the time prescribed is fatal to the right to appeal.[11] But where the party desiring to appeal is prevented from doing so within the time prescribed by the statute by the default of the court or any of its officers, the appeal will not be dismissed.[12]

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[9] C. C. Rules, 1916, No. 66, Sec. 2; Cummins & Beecher's Mich. Rule Book, page 653.

[10] C. L. 1915, (13758): P. A. 1915, Act No. 314, Ch. 50, Sec. 23, page 338; Cummins & Beecher's Mich. Judicature Act, §1880; Winegar v. Fritz, 164 Mich. 427, 129 N. W. R. 878; Commercial National Bank v. Gaukler, 164 Mich. 215, 129 N. W. R. 195; Macomber v. Cottrell, 162 Mich. 720, 127 N. W. R. 402; Hulan v. Circuit Judge, 159 Mich. 608, 121 N. W. R. 574.

### §483. Method of Settling the Evidence for Review.

After a final decree has been settled the party who desires to appeal should, as soon as practicable, order and procure from the court stenographer a transcript of the testimony taken on the trial of the cause. Any unnecessary or unexplained delay in doing so will be a good reason for a denial of an application for an extension of time to settle a case for review if such application should be made. On the other hand if a timely application for such transcript is made, and for any reason the stenographer fails to furnish such transcript in time to prepare the case on appeal for settlement, that fact will furnish good cause for an extension of time.

When the transcript of the testimony is procured, counsel for the appellant should prepare a case for settlement and review, and procure thereto the signature of the circuit judge who heard the cause. In preparing the case for review on appeal, the testimony should be condensed as much as can be consistently done, and should be in narrative form, except in those instances where it may become necessary to give the questions and answers that there be a proper understanding of the same. If any part of the testimony is set out in the proposed case on appeal by questions and answers, the trial judge who settles the case must certify in writing that he deems it material and necessary in order to give a full understanding of the questions involved, that such parts of the case as are set forth by questions and answers should be so set forth.[13]

The case proposed for settlement must contain the substance of all the testimony taken and read on the trial and all of the proceedings had during the trial under the provisions of the Judicature Act, Chapter Seventeen, Section Five, relating to excluded testimony offered on the trial.[14]

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[11] Perkins v. Perkins, 173 Mich. 695, 140 N. W. R. 161; Bennett v. Hickey, 110 Mich. 628, 68 N. W. R. 650; Trombley v. Klersy, 139 Mich. 311, 102 N. W. R. 736; Thompson v. McKay, 154 Mich. 228, 117 N. W. R. 624; Lum v. Fairbanks, 155 Mich. 23, 118 N. W. R. 578.

[12] Perkins v. Perkins, 173 Mich. 695, 140 N. W. R. 161; Cameron v. Calkins, 43 Mich. 191, 5 N. W. R. 292; Kalamazoo v. Kalamazoo Heat, Light & Power Co., 122 Mich. 489, 81 N. W. R. 426; Waterman v. Bailey, 111 Mich. 571, 69 N. W. R. 1109.

[13] C. C. Rules, 1916, No. 66, Sec. 8; Cummins & Beecher's Mich. Rule Book, page 655.

## §484. Notice of Settling Case on Appeal.

After the case on appeal has been prepared in accordance with the statute and rules of practice, a copy of the same, together with a notice of when and where the same will be presented for settlement and signature by the judge who tried the case, must be served on the adverse party at least four days before the time fixed for such settlement.[15] The party proposing such settlement must furnish the adverse party with such portions of the stenographer's transcript of his minutes as shall have been procured, for inspection and use for such adverse party in the preparation of amendments to the proposed case, together with the original copies of such exhibits, papers and writings, or documents as are incorporated in such proposed case, and may also be required to furnish a copy of such further portions of the stenographer's minutes as shall be deemed necessary by the court to a settlement of such case.[16] Amendments to such proposed case may be prepared in writing by the opposite party, and all contentions respecting the same will be determined by the trial judge according to the facts at such time and place as he shall appoint.[17] The parties or their attorneys may agree upon a statement of facts without procuring a transcript of the testimony from the stenographer, and in such case, if satisfactory to the judge who heard the case or proceedings, or any other judge with authority in the premises under the statute and rules of practice, it will be signed and certified to by such judge, and when so signed and certified it will stand as the case for review in the Supreme Court.[18]

When the case for review by the Supreme Court has been settled and signed by the circuit judge it is delivered to the appellant, who is required to file it with the clerk of the circuit court within ten days thereafter, and if not filed within that time the appellant will be deemed to have waived the benefit of such case for review, unless further time shall be allowed for filing the same by the trial judge on special motion for cause shown.[19]

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[14] C. C. Rules, 1916, No. 66, Sec. 7; Cummins & Beecher's Mich. Rule Book, page 655.

[15] C. C. Rules, 1916, No. 66, Sec. 9, Cummins & Beecher's Mich. Rule Book, page 655.

[16] C. C. Rules, 1916, No. 66, Sec. 3; Cummins & Beecher's Mich. Rule Book, page 654.

[17] C. C. Rules, 1916, No. 66, Sec. 9; Cummins & Beecher's Mich. Rule Book, page 655.

[18] C. C. Rules, 1916, No. 66, Sec. 10; Cummins & Beecher's Mich. Rule Book, page 655.

Whenever the judge who heard the cause shall die, resign, or vacate the office before the expiration of his term, or whenever he shall be unable to settle the case for review by reason of sickness, absence from the state, or for any other cause whatsoever, within the time prescribed by the statute and rules of practice, such evidence may be settled by any other judge of the same circuit, and in case there shall be no other judge of such court, or in case of his or their absence or disability from any cause, then such evidence may be settled by the successor of such judge, if not disqualified, or by any circuit judge.[20] The several sections of Rule Sixty-six and Chapter Fifty of the Judicature Act before cited cover the practice in relation to the settlement of the evidence in chancery cases for review in the Supreme Court. It should be remembered, however, that in all chancery appeals a written claim of appeal must be filed within twenty days from the time of the entry of the decree or order appealed from, and within the same time the fee of five dollars paid to the clerk of the court for making the return, whether the case for review is yet settled or not. The requirements of this rule, No. 66, are mandatory and can be waived only in writing duly filed and presented as the foundation for the action of the court.[21]

## §485. Duty of Clerk.

Within fifteen days after an appeal is perfected it is the duty of the clerk of the court, upon the payment to him by the appellant of the sum of five dollars as his fee, to attach together the original bill, process, answer, and all other proceedings, processes, motions, notices, orders and decrees which have been filed in the cause, together with the testimony as settled, signed and certified to by the judge, as well as a copy of all journal or calendar entries and all other proceedings of record in the cause not embraced in the original papers above mentioned, and transmit the same to the Supreme Court, together with his certificate of the genuineness of such originals and the correctness of such copies of such journal and calendar entries and records. The appeal will be deemed to have been perfected upon the filing of the claim of appeal and payment of the clerk's fee at any time within twenty days after the entry of the order or decree appealed from, unless it shall be necessary to settle a case. In all causes where it becomes necessary to settle a case for review, the appeal will be deemed to have been perfected when such case shall be settled and signed.[22]

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[19] C. C. Rules, 1916, No. 66, Sec. 11; Cummins & Beecher's Mich. Rule Book, page 655.

[20] C. C. Rules, 1916, No. 66, Sec. 12; Cummins & Beecher's Mich. Rule Book, page 656.

[21] Burgess v. Circuit Judge, 171 Mich. 583, 137 N. W. R. 247; Hill v. Hill, 114 Mich. 599, 72 N. W. R. 597; Lake Shore & M. S. R. R. Co. v. Circuit Judge, 116 Mich. 399, 74 N. W. R. 529; Roach v. Circuit Judge, 117 Mich. 242, 75 N. W. R. 465; Singer v. Circuit Judge, 117 Mich. 318, 75 N. W. R. 609; Hayes v. Ionia Circuit Judge, 125 Mich. 277, 84 N. W. R. 141; Kaiser v. Circuit Judge, 162 Mich. 247, 127 N. W. R. 336; Pettinger v. Circuit Judge, 164 Mich. 463, 129 N. W. R. 676.

The notice and showing required by the Rule may be waived under certain circumstances; Wilkins v. Circuit Judge, 125 Mich. 628, 84 N. W. R. 1107; Culver v. Circuit Judge, 141 Mich. 644, 105 N. W. R. 139.

## §486. Original Files may be Dispensed with—When.

The new circuit court rules provide that "in cases removed to the Supreme Court for review by a writ or error, case made, or appeal, the transcript of the record in writs of error and the transmission of the original files in appeal cases may be dispensed with under the following circumstances and conditions: The appellant shall attach to the bill of exceptions, case made, or case settled, but separate therefrom copies or a fair abstract of each material pleading and document, order, verdict, judgment or decree filed of record in the case, all to be arranged chronologically; those made or filed before the judgment, order or decree to appear before the statement relating to the testimony; those made or entered after the trial to be entered after the statement made of the testimony; all to be duly settled and certified by the judge. The clerk forthwith, after filing of the same, shall transmit the same to the clerk of the Supreme Court, which shall be the record of said court for further action in the case, unless the Supreme Court shall, by order, require further copies or abstracts of such pleadings and proceedings, or the originals thereof, to be returned. A fee of five dollars shall be paid to the clerk for the filing and transmission of such substituted record, which shall be in lieu of all other fees for making a return on such appeal. By consent of the parties or on order of the trial judge or of the Supreme Court, any original document shall be presented to the Supreme Court for inspection through the clerk of the lower court or the attorneys in the cause.[23]

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[22] C. L. 1915, (13759); P. A. 1915, Act No. 314, Ch. 50, Sec. 24, page 339; Cummins & Beecher's Mich. Judicature Act, §1881; Winegar v. Fritz, 164 Mich. 427, 129 N. W. R. 878; Commercial National Bank v. Gaukler, 164 Mich. 215, 129 N. W. R. 195; Macomber v. Cottrell, 162 Mich. 720, 127 N. W. R. 402; Hulan v. Circuit Judge, 159 Mich. 608, 124 N. W. R. 574.

While the language of this rule seems to be broad enough to include chancery appeals, there may be a serious question whether it was so intended or can be so applied. The authority of the Supreme Court to prescribe rules of practice in the circuit courts is found in Section Five of Article Seven of the constitution, as follows: "The Supreme Court shall by general rules establish, modify and amend the practice in such court, and in all other courts of record, and simplify the same." It is a question whether under this constitutional provision and statutory enactments the Supreme Court can by rule modify a statutory enactment as to practice.[24] The Judicature Act provides that in all chancery appeals the original bill, pleadings, process, etc., shall be returned with a chancery appeal.[25] The same act in regard to the authority of the Supreme Court to prescribe rules of practice in the circuit courts provides that "the Supreme Court shall amongst other things regulate and prescribe the practice therein, and in the circuit court where the same is not prescribed by any statute in relation to bills of exceptions, cases made by the parties, special verdicts, granting new trials, motions in arrest of judgment, taxation of costs, giving notice of special motions and of such other proceedings as the court may think proper, staying proceedings when necessary to prevent injustice, and the hearing of motions, imposing terms in their discretion on granting such motions."[26] Section Fourteen of Chapter One of the Judicature Act also provides that "the justices of the Supreme Court shall have power, and it shall be their duty, by general rules to establish and from time to time thereafter to amend the practice in such Court, and in all other courts of record, *in cases not provided for by any statute;* and they shall once at least in every two years thereafter, if necessary, revise the said rules, with the view to the attainment, so far as may be practicable, of the following improvements in the practice." It would seem, therefore, that Supreme Court Rule No. 68, which provides for the return and transmission on appeal of copies or abstracts of pleadings and process instead of the originals, if it is to be applied to chancery appeals, is in direct conflict with the provisions of the Judicature Act, which require the originals to be returned to the Supreme Court in all chancery appeals.

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[23] C. C. Rules, 1916, No. 68; Cummins & Beecher's Mich. Rule Book, page 659.

[24] Byrne v. Gypsum Plaster & Stucco Co., 141 Mich. 62, 104 N. W. R. 737.

[25] C. L. 1915, (13759); P. A. 1915, Act No. 314, Ch. 50, Sec. 24, page 339; Cummins & Beecher's Mich. Judicature Act, §1881.

[26] C. L. 1915, (12029); P. A. 1915, Act No. 314, Ch. 1, Sec. 24, page 7; Cummins & Beecher's Mich. Judicature Act, §191.

## §487. Extension of Time for Making Return.

The time for returning the record to the Supreme Court in chancery appeals may be extended by one of the justices of the Supreme Court, or a circuit judge, for good cause shown, and any order granting such extension must be returned with the other papers to the clerk of the Supreme Court.[27] Notice of the time and place of making application for such extension, together with copies of the affidavits upon which the application is based, must be served upon the adverse party at least four days before the time the application is to be made.

All appeals are statutory, and, in the absence of statutory authority, no right of appeal exists.[28] It is a remedy which the legislature in its discretion may grant or take away, and it may prescribe in what cases and under what conditions or circumstances appeals may be taken; and unless the statute expressly, or by plain implication, provides for an appeal from a judgment of a court of inferior jurisdiction, none can be taken. And even where a party has a clear right to appeal if undertaken within the time and under the circumstances and conditions prescribed by the statute, such conditions must be performed within the time, and substantially as prescribed. It follows, therefore, that all of the requirements of the statute relating to appeals are jurisdictional and must be substantially complied with.[29] If it becomes necessary to have an extension of time for making the return to an appeal, application must be made therefor before the time allowed by the statute expires. But where, owing to the default of the court or its officers, the perfecting and return of the appeal has not been seasonably made, such appeal will not be dismissed after it has been returned to the Supreme Court.[30]

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[27] Supreme Court Rules, No. 16; Cummins & Beecher's Mich. Rule Book, page 511; Waterman v. Bailey, 111 Mich. 571, 69 N. W. R. 1109; Grand Rapids v. C. & W. M. R. R. Co., 95 Mich. 473, 58 N. W. R. 359; Gram v. Wasey, 45 Mich 224, 7 N. W. R. 84, 762; Tucker v. Stone, 92 Mich. 298, 52 N. W. R. 302; Cameron v. Calkins, 43 Mich. 191, 5 N. W: R. 292.

[28] Sullivan v. Haug, 82 Mich. 555, 46 N. W. R. 795.

### §488. Motion to Dismiss.

If the appellant neglects to file in the Supreme Court the record and proceedings had before the trial court, within the time prescribed by the rules of court and the statute, the appellee may move the Supreme Court to have such appeal entered and dismissed for want of prosecution;[31] and the court may grant or deny such motion on such terms and conditions as the justice of the case may require.[32]

### §489. Service of Papers.

All notices required to be given must be in writing and served on the attorney or counsel in the cause. If the party is also an attorney and prosecutes in person, or if the defendant gives notice that he is an attorney and will defend in person, all notices and other papers must be served on him in like manner. Where the object and purpose of the notice is to bring the party into contempt of court, the service must be on the party personally, unless otherwise directed by the Court.[33]

### §490. Notices—How Served.

Notices and papers required to be served on the attorney of one of the parties may be served as follows:

(1) By delivering them to him personally;

(2) By leaving the same in his office with his clerk or with a person having charge of such office;

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[29] Portage Lake & L. S. S. Canal Co. v. Haas, 20 Mich. 326; Canfield v. Brigg City of Erie, 21 Mich. 160; People's Ice Co. v. Steamer Excelsior, 43 Mich. 336, 5 N. W. R. 398.

[30] Cameron v. Calkins, 43 Mich. 191, 5 N. W. R. 292; Gram v. Wasey, 45 Mich. 223, 7 N. W. R. 767; Lake Shore & M. S. R. R. Co. v. Chambers, 89 Mich. 5, 50 N. W. R. 741.

[31] Supreme Court Rule No. 8; Cummins & Beecher's Mich. Rule Book, page 506.

[32] Supreme Court Rule No. 9; Cummins & Beecher's Mich. Rule Book, page 506.

[33] Supreme Court Rule No. 21; Cummins & Beecher's Mich. Rule Book, page 513.

(3) When no person is to be found in his office, by leaving the same between the hours of six in the morning and nine in the evening in some suitable and conspicuous place in such office;

(4) If the office be not open so as to admit of service therein, then by leaving the same at the residence of the attorney with some person of suitable age and discretion;

(5) By depositing the same in the post office inclosed in a sealed envelope plainly addressed to such attorney at his place of business (according to the best possible information and belief of the person making such service) with the postage thereon fully prepaid.[34]

Service by mail is lawful in all cases, unless the statute or rules of practice require personal service, but in all cases of service by mail the time of service must be increased one day for every one hundred miles distance, or fraction thereof, between the place of deposit in the mail and the place of address.[35]

## §491. Computation of Time.

The rules of practice provide that "the day on which any rule shall be filed, order, notice, pleading, or paper served, shall be excluded in the computation of time for complying with the exigency of such rule, order, notice, pleading or paper, and the day on which compliance therewith is required shall be included, except where it shall fall on Sunday, in which case the party shall have the next day to comply therewith. When by the terms of any order a party is required to perform any act instanter, it shall be done within twenty-four hours."[36]

## §492. Court may Direct Manner of Service—When.

"In all cases where service of papers cannot reasonably be made on account of lack of an attorney of record, or the inability to find a party, or on account of the absence of the attorney of record from his usual place of abode, residence or office, or for any other reason, this court, or one of the justices thereof, upon an *ex parte* application, on cause shown, may direct in what manner and upon whom service shall be made."[37]

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[34] Supreme Court Rule No. 22; Cummins & Beecher's Mich. Rule Book, page 513.

[35] Supreme Court Rule No. 23; Cummins & Beecher's Mich. Rule Book, page 514.

[36] Supreme Court Rule No. 25; Cummins & Beecher's Mich. Rule Book, page 514; Vohlers v. Stafford Mfg. Co., 171 Mich. 13, 137 N. W. R. 131; Moreland v. Circuit Judge, 144 Mich. 331, 107 N. W. R. 873.

## §493. Practice Relating to Motions.

All motions and affidavits in support thereof to be made in the Supreme Court must be typewritten or printed and filed with the clerk. The motion must contain a brief statement of the object and grounds of the same. All papers filed by either party on motions must contain proof of service of the same on opposing counsel. No oral arguments will be heard on motions (except where constitutional questions are involved) unless by special permission of the court first obtained. When oral arguments are permitted they will be limited to fifteen minutes on each side unless further time is granted by the court before the argument is commenced.[38]

Notice of argument of motions, together with copies thereof and of the affidavits on which they are based, must be served upon the opposing attorney at least four days before the time noticed for hearing the motion, unless the opposing attorney resides outside the City of Lansing, in which case the time of service must be increased one day for every additional one hundred miles or fraction thereof between his place of residence and the City of Lansing.[39]

## §494. Motion Days and Motion Docket.

The motion days in the Supreme Court are Tuesday of each week during the term, on which days motions will have preference over calendar causes, and all special motions must be noticed for one of these days. Motions will be heard on the days for which they are noticed unless adjourned over to a subsequent motion day, or unless there is not time to hear the same on the day for which they are noticed, in which case they will be heard on the next succeeding day.[40] Each party is required to submit a printed or type written brief at the time motions are argued.[41] The clerk of the Supreme Court is required to keep a motion docket, and to enter therein motions filed in the order in which they were delivered to him, and on the opening of court on motion days to present such docket to the court. Motions will be called in the order in which they appear on the docket, and no motion will be entertained unless brought before the court in the manner provided for by the rules of court.[42] The time limited by the rules of court for making motions or applications, or giving any notice, or taking any action, may be shortened or extended in any case by the court or any justice thereof, unless the time is limited by statute.[43] No private agreement or consent between the parties or their attorneys in regard to the proceedings in any cause will be recognized by the court as binding unless the same is reduced to writing, signed by the party or his attorney against whom the same shall be alleged, and filed in the office of the clerk of the court.[44]

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[37] Supreme Court Rule No. 26; Cummins & Beecher's Mich. Rule Book, page 515.

[38] Supreme Court Rule No. 27; Cummins & Beecher's Mich. Rule Book, page 515.

[39] Supreme Court Rule No. 28; Cummins & Beecher's Mich. Rule Book, page 515.

[40] Supreme Court Rule No. 29; Cummins & Beecher's Mich. Rule Book, page 516.

## §495. Notice of Argument of Causes.

After the record in an appeal case has been filed in the Supreme Court and the time for filing the same has elapsed, either party may notice the case for hearing. Such notice must be given at least thirty days before the first day of the term at which the argument is desired.[45] The notice of hearing and argument must be served on the attorney for the opposite party, and proof of such service by affidavit must be made, showing the time and manner of such service, and such proof of service must be filed in the office of the Supreme Court.

The party noticing a calendar cause for hearing must, at least twenty days before the first day of the term for which the same is noticed, give notice to the clerk of the Supreme Court to place the cause on the calendar for that term. The priority of causes on the calendar as first made up depends upon the date of filing the notice of hearing with the clerk. No cause will be entered on the calendar until the record on appeal shall have been filed with the clerk, nor without notice to the clerk as above stated. Causes may be placed lower down on the calendar, or grouped to suit the convenience of counsel, by filing a stipulation to that effect not later than the Saturday before the first day of the term. After the calendar has been rearranged by the clerk no further change can be made by counsel, except to continue or place at the foot of the calendar. In cases where counsel are not present in court, notice of motions for continuance to be heard on the first day of the term must be given at least twenty-four hours previous thereto, and if for any subsequent day two days notice must be given.[46]

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[41] Supreme Court Rule No. 20; Cummins & Beecher's Mich. Rule Book, page 516.

[42] Supreme Court Rule No. 31; Cummins & Beecher's Mich. Rule Book, page 516.

[43] Supreme Court Rule No. 32; Cummins & Beecher's Mich. Rule Book, page 517.

[44] Supreme Court Rule No. 33; Cummins & Beecher's Mich. Rule Book, page 517.

[45] Supreme Court Rule No. 34; Cummins & Beecher's Mich. Rule Book, page 517; Bryne v. Gypsum Plaster & Stucco Co., 141 Mich. 62, 104 N. W. R. 410.

## §496. Record to be Printed and Served.

In all chancery appeals the appellant must prepare a printed record for the use of the court, which is required to contain all of the testimony, and so much of the pleadings, record and proceedings (and no more) as may be necessary to present the questions raised. The date of the official filing of each pleading set out or referred to in the record must be stated. All records, arguments and briefs printed for the use of the court must be in small pica type, twenty-four pica "ems" to the line, thirty-five lines to a page, leaded with four-to-pica leads, and printed upon unglazed paper. The record must have a suitable cover containing the title of the court and cause, the court from which the case is appealed, and the name of the judge before whom the cause was heard. The size of all printed records and briefs must be nine and one quarter by six and one quarter inches. Any record or brief which fails to meet these requirements will not be received by the clerk.[47] The record must contain a complete index of the names of the witnesses whose testimony appears therein, and a reference to the pages whereon the examination, cross-examination and redirect examination is found; also the pages whereon any exhibit appears, and in brief form the substance of each exhibit. The index must be printed in the front of the record. No record will be received by the clerk which does not contain an index arranged substantially as above required.[48]

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[46] Supreme Court Rule No. 44; Cummins & Beecher's Mich. Rule Book, page 525.

[47] Supreme Court Rule No. 35; Cummins & Beecher's Mich. Rule Book, page 518; Dolph v. Norton, 158 Mich. 426, 123 N. W. R. 13; In re Sullivan, 165 Mich. 588, 131 N. W. R. 180; Bedard v. Simons, 160 Mich. 547, 125 N. W. R. 381; Frolich v. Blackstock, 155 Mich. 605, 119 N. W. R. 906; Enterprise Foundry Co. v. Iron Moulders Union, 149 Mich. 32, 122 N. W. R. 685. A decision by four justices of the Supreme Court, in a case heard by seven, establishes the law of the case; Dolph v. Norton, 158 Mich. 417, 123 N. W. R. 13; Weller v. Wheelock, 155 Mich. 698, 118 N. W. R. 609.

In all chancery appeals the appellant is required to cause the record to be printed as soon as practicable after the filing of the return in the office of the clerk of the Supreme Court, and as soon as the printing is completed to serve at least two copies of the same upon counsel for the appellee; and before the first day of the term at which the cause is noticed for argument he must file with the clerk of the Supreme Court at least eighteen printed copies thereof. In all cases the appellant must serve the printed record on counsel for the appellee within thirty days after the filing of the return in the Supreme Court, and within the time allowed by rule for the service of the first brief, unless further time therefor shall be granted. This provision does not give the appellant thirty days in every case, but only so much time as is reasonably necessary after the filing of the return in the Supreme Court. If the appellant fails to print and serve the record within the time as above stated, or within such further time as may be granted on motion, the court may, on motion of the appellee, dismiss the case and award costs to the appellee, or grant further time for compliance with such requirements on such terms as shall be proper. If the appellant fails to have the printed record filed before the first day of the term for which the cause is regularly noticed for argument, the cause will be stricken from the calendar on the first day of the term, and may be further dealt with as justice may require.[49]

## §497. Contents and Service of Briefs.

Briefs must be printed in the same kind of type and must be of the same size as the record. The brief of the appellant, if he is also the plaintiff, must contain a clear and concise statement of the facts of the case, distinct from argument, and the questions involved and the manner in which they are raised. The court will consider such statement sufficient and accurate unless the opposite party shall point out in his brief wherein such statement is insufficient or inaccurate.[50]

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[48] Supreme Court Rule No. 36; Cummins & Beecher's Mich. Rule Book, page 518.

[49] Supreme Court Rule No. 38; Cummins & Beecher's Mich. Rule Book, page 519.

After a hearing and decree in a chancery case it is the duty of the plaintiff to furnish the Supreme Court with the first brief, no matter which party appeals.[51]

If the defendant's brief points out no error or insufficiency in the statement of facts contained in the plaintiff's brief, but contains an entirely distinct statement of facts in disregard of this rule, the Court will accept the statement as contained in the plaintiff's brief and consider only the questions raised thereby.[52]

As a matter of convenience to the court and counsel, any alleged inaccuracy or insufficiency in the plaintiff's statement of facts should appear in the beginning of the plaintiff's brief.[53] The purpose and object of requiring a statement of facts, of the questions involved, and of the manner in which they are raised to be clearly and concisely set out in the plaintiff's brief, is to save the court the time of going through voluminous records to ascertain the questions which it is required to pass upon in the controversy, and the rule should be strictly and conscientiously followed and complied with.[54]

Counsel for the defendant should in all cases carefully examine the statement of facts contained in the plaintiff's brief in connection with the record, and if found to be incorrect or insufficient in any material particular, the precise error or insufficiency should be pointed out, and the correction made or the deficiency supplied, with a reference to the part of the record sustaining his statement.[55]

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[50] Supreme Court Rule No. 40; Cummins & Beecher's Mich. Rule Book, page 521.

[51] Pinel v. Pinel, 172 Mich. 611, 146 N. W. R. 117; Chase v. Michigan United Ry. Co., 165 Mich. 493, 131 N. W. R. 118.

[52] Haden v. Closser, 153 Mich. 183, 116 N. W. R. 1001.

[53] Monger v. New Era Association, 145 Mich. 685, 108 N. W. R. 1111; Shinglemeyer v. Wright, 124 Mich. 238, 82 N. W. R. 887, 50 L. R. A. 129.

[54] Ferguson v. Wilson, 122 Mich. 98, 80 N. W. R. 1006.

[55] Supreme Court Rule No. 40; Cummins & Beecher's Mich. Rule Book, page 521. This rule is the same as former Rule No. 61, which has been cited or construed in the following cases: Schulte v. Kelly, 124 Mich. 330, 83 N. W. R. 405; People v. Jamieson, 124 Mich. 164, 82 N. W. R. 835; Shinglemeyer v. Wright, 124 Mich. 230, 82 N. W. R. 887; Carmer v. Hubbard, 123 Mich. 333, 82 N. W. R. 64; Gerardo v. Brush, 120 Mich. 405, 79 N. W. R. 646; Webber v. Hayes, 117 Mich 256, 75 N. W. R. 622; Hoffman v. Pack, 114 Mich. page 1, 67 N. W. R. 118; French v. Ryan, 104 Mich. 625, 62 N. W. R. 1016; Zimmerman v. Dolph, 104 Mich. 282, 62 N. W. R.

Two copies of the appellant's brief must be served upon the appellee as soon as printed, and at least twenty days before the first day of the term at which the cause is regularly noticed for hearing. Two copies of the appellee's brief must be served upon appellant's counsel as soon as printed, and at least five days before the first day of the term at which the cause is regularly noticed for hearing; but if the printed record and appellant's brief shall be served thirty days before the term, the appellee's brief must, in such case, be served at least fifteen days before the first day of the term. The foregoing provisions apply in chancery appeals where the plaintiff is also appellant, or when the defendant appeals from an order overruling or denying a motion to dismiss. In other chancery cases heard on pleadings or on pleadings and proofs, when the plaintiff is appellee, his brief must be served upon the defendant at least fifteen days before the first day of the term at which the cause is regularly noticed for hearing (or within ten days after service of the printed record by appellant, if the same is not served at least twenty-five days before the first day of the term); and the appellant's brief must be served at least five days before the first day of the term (or within ten days after service of the plaintiff's brief.

The first briefs are expected to fully and fairly present the case on each side, and supplemental briefs may be printed and served at any time before the cause is placed upon the call for argument, but subsequently by permission of the court only. It is not good practice, and the court will be likely to disapprove it, to present the cause only partially in the first brief, to be more fully presented in a supplemental brief after having received the brief of the other party. The first brief of either party should present his view of the case fully and completely, and a supplemental brief should be employed only to answer that which has been presented by the brief of the opposite party.

If the brief of either party is not served within the time above mentioned, the opposite party, on the first day of the

339; Mason v. Partrick, 100 Mich. 580, 59 N. W. R. 239; Dake Engine Mfg. Co. v. Hurley, 99 Mich. 19, 57 N. W. R. 1044; Graves v. Battle Creek, 95 Mich. 266, 54 N. W. R. 757; Lynch v. Craney, 95 Mich. 200, 54 N. W. R. 879; Busch v. Fisher, 89 Mich. 193, 50 N. W. R. 788; Sullivan v. Hall, 86 Mich. 7, 48 N. W. R. 646; Black v. Dawson, 82 Mich. 485, 46 N. W. R. 793; St. James v. Erskine, 155 Mich. 606, 119 N. W. R. 897; Carmer v. Hubbard, 123 Mich. 333, 82 N. W. R. 64.

term, may at his option have the cause placed at the foot of the calendar, or continued, and the court in proper cases may order the payment of a counsel fee by the party in default.[56] Eighteen copies of the brief for each party must be filed with the clerk of the Supreme Court at least forty-eight hours before the case is placed on call. No oral argument will be allowed a party who has failed to comply with this provision.[57]

## §498. Call of Cases and Argument.

On the first day of the term the first business transacted is usually hearing and disposition of motions. After motions are disposed of the court will begin the calling of the calendar cases for argument in the order in which they stand on the rearranged calendar, and proceed in the same order from day to day, and if the parties or either of them are ready for argument when the case is called the same will be heard. If neither party is ready to proceed with the argument the cause will be regarded as submitted on briefs. After a cause has been placed on call it cannot be withdrawn, except to continue the same, and a continuance will be granted only upon a sufficient showing of the death or illness of counsel. Fifteen cases are liable to be placed on call each day during the term. No cause will be taken up out of its order or set down for a day certain, except under special and peculiar circumstances to be shown to the court. On motion days motions take precedence over calendar causes.[58]

While as a general rule the court will not consider and pass upon a question on appeal which was not presented or raised in the lower court, still, in the exercise of its appellate jurisdiction, the court may, and sometimes does, direct the attention of counsel to questions it deems material to a just and equitable disposition of the case, and request argument of counsel thereon, although such questions were not raised or argued by counsel in the lower court on the trial.[59]

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[56] Supreme Court Rule No. 41; Cummins & Beecher's Mich. Rule Book, page 523.

[57] Supreme Court Rule No. 42; Cummins & Beecher's Mich. Rule Book, page 524.

[58] Supreme Court Rule No. 45; Cummins & Beecher's Mich. Rule Book, page 526.

[59] C. L. 1915, (12016); P. A. 1915, Act No. 314, Ch. 1, Sec. 11, page 5; Cummins & Beecher's Mich. Judicature Act, §178; Gadd v. City of Detroit, 142 Mich. 685, 106 N. W. R. 210; Auditor General v. Bolt, 147 Mich. 286, 111 N. W. R. 74; C. L. 1915, (12010); P. A. 1915, Act No. 314, Ch. 1, Sec. 5, page 4; Cummins & Beecher's Mich. Judicature Act, §172.

The parties are entitled to an oral argument in all calendar causes and upon all motions involving constitutional questions. Two counsel on each side may be heard in the oral argument of calendar causes. The time allowed for oral argument in causes involving five hundred dollars or less is not more than one half hour on each side. In all other calendar causes the time allowed will not exceed one hour on each side. The time for argument may be extended by the court, upon application granted before the argument is commenced.[60] Any cause may be submitted upon briefs at any time.[61]

## §499. Taxation of Costs.

The necessary expense of printing the record and briefs required by the rules of practice may be taxed as disbursements in favor of the party prevailing in the cause.[62] If the appellant prevails in the Supreme Court, he is also entitled to tax as costs the sum of five dollars paid to the clerk of the circuit court for the return, and the sum of six dollars paid the clerk of the Supreme Court for the entry fee in that court.

A counsel fee will be awarded the prevailing party in the Supreme Court, unless otherwise ordered, in addition to such other costs as he may be entitled to, as follows: On motions which do not finally dispose of the case, ten dollars; on mandamus and certiorari heard as motions, fifteen dollars; on motions which finally dispose of the case, twenty dollars; on calendar causes, thirty dollars.[63]

The costs will be taxed by the clerk of the Supreme Court on notice of not less than four days. If the party upon whom such notice is to be served resides outside the City of Lansing, the time of serving a notice of taxation of costs must be one day for every additional one hundred miles, or fraction thereof, between his place of residence and the City of Lansing, but no notice of more than ten days need be given. The notice must be accompanied by a copy of the bill proposed to be taxed, and the affidavit of disbursements proposed to be read in support thereof. The notice may be served by mail, and the time and manner of service must be shown by the affidavit of the person making the same.[64]

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[60] Supreme Court Rule No. 46; Cummins & Beecher's Mich. Rule Book, page 526.

[61] Supreme Court Rule No. 47; Cummins & Beecher's Mich. Rule Book, page 527; Harrington v. Wands, 23 Mich. 385; Detroit Board of Education v. Wayne County Treasurer, 8 Mich. 392.

[62] Supreme Court Rule No. 48; Cummins & Beecher's Mich. Rule Book, page 527.

[63] Supreme Court Rule No. 49; Cummins & Beecher's Mich. Rule Book, page 528.

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[64] Supreme Court Rule No. 50; Cummins & Beecher's Mich. Rule Book, page 528. The questions involved in the Rules in relation to the award and taxation of costs are passed upon in the following cases: Lester v. Sutton, 7 Mich. 329; Wilson v. Wilson, 6 Mich. 272; holding that in preparing a case for argument in the Supreme Court on a chancery appeal, counsel must exercise their own judgment and discretion as to whether they will print the whole evidence, or omit the formal and, what may be deemed, the unimportant portions; and the court on taxation of costs will not interfere with the exercise of such discretion unless it clearly appears to have been abused. McCurdy v. Clark, 27 Mich. 445; Whiting v. Butler, 29 Mich. 122; Adams v. Champion, 31 Mich. 233; Crittenden v. Schermerhorn, 35 Mich. 370; Howe v. Lemon, 37 Mich. 164; Fredenburg v. Turner, 37 Mich. 402; Sager v. Tupper, 38 Mich. 259; Barnard v. Colwell, 39 Mich. 215; Brown v. Blanchard, 40 Mich. 61; VanDeusen v. Newcomer, 40 Mich. 525; Michigan Mutual Life Ins. Co. v. Conant, 40 Mich. 530; Evans v. Sutherland, 41 Mich. 177; 1 N. W. R. 927; Stebbins v. Field, 41 Mich. 373, 2 N. W. R. 190; Arnold v. Bright, 41 Mich. 416, 2 N. W. R. 16; Maxwell v. Bay City Bridge Co., 42 Mich. 67, 51 N. W. R. 963; Clark v. Sable, 44 Mich. 1; Ludington v. Melendy, 44 Mich. 560, 7 N. W. R. 240; Wright v. Smith, 44 Mich. 560, 7 N. W. R. 240; Dickinson v. Seaver, 44 Mich. 633, 7 N. W. R. 182; Engle v. Hall, 45 Mich. 57, 7 N. W. R., 239; Demill v. Moffat, 45 Mich. 410, 8 N. W. R. 79; Watts v. Tittabawassee Boom Co., 47 Mich. 540, 11 N. W. R. 377; Bates v. Desenberg, 47 Mich. 643. A charge for obtaining a copy of the record for the printer is a proper item in taxing costs. Botsford v. Murphy, 48 Mich. 642; Wildey v. Farmers' Mutual Fire Ins. Co., 49 Mich. 264, 13 N. W. R. 583; Johnson v. Rose, 50 Mich. 334, 15 N. W. R. 497; Rice v. Rice, 50 Mich. 448, 15 N. W. R. 545; McKenna v. Kirkwood, 50 Mich. 544, 15 N. W. R. 898; Erickson v. Mich. Land & Iron Co., 50 Mich. 604, 16 N. W. R. 161; Port Huron v. Chadwick, 52 Mich. 320, 17 N. W. R. 929; Clark v. Wiles, 54 Mich. 324, 20 N. W. R. 63; Case v. Dewey, 55 Mich. 117, 20 N. W. R. 21, 911; Singer Mfg. Co. v. Benjamin, 55 Mich. 330, 21 N. W. R. 358; Newkirk v. Newkirk, 56 Mich. 525, 23 N. W. R. 206; Wilson v. Pontiac, O. & P. A. R. Co., 57 Mich 155, 23 N. W. R. 627; See v. Derr, 57 Mich. 369, 24 N. W. R. 108. Costs were withheld where, on review, the court was equally divided. Benedict v. Crookshank, 58 Mich. 107, 24 N. W. R. 795; Jeffery v. Hursh, 58 Mich. 247, 25 N. W. R. 176; Smith's Estate, 60 Mich. 136, 27 N. W. R. 80; Thurstin v. Luce, 61 Mich. 486 & 292, 28 N. W. R. 103; Dayton v. Dayton, 68 Mich. 437, 36 N. W. R. 209; New Home Sewing Machine Co. v. Bothane, 70 Mich. 443, 38 N. W. R. 326; Chadwick v. Walsh, 70 Mich. 627, 38 N. W. R. 602; Hilliker v. Coleman, 73 Mich. 170, 41 N. W.

## §500. Application For Rehearing—Costs.

Whenever a cause is heard by a quorum of five justices only, and a dissenting opinion is filed, the parties have a right to a rehearing before the full bench, upon making a proper application therefor.[65]

In other cases rehearings are largely in the discretion of the court, and will be granted only where it is clearly shown that there is some mistake or error in the decision of the court.

In all applications for rehearing, whether by reason of there having been a dissenting opinion filed in a cause which was heard by a quorum of five justices only or for any other reason, the moving party must, at as early a date as may be practicable, cause any and all papers upon which such application is based, together with his reasons for granting the same, to be printed and twelve copies thereof to be filed with the clerk of the Supreme Court, and a copy of the same to be served upon counsel for the opposite party; and no such application will be considered by the court unless the foregoing provisions are complied with. Proof of such service must also be filed with the clerk of the Supreme Court. After the expiration of not less than four days after such service the court will examine the papers and, without further argument, unless specially ordered, will pass upon the application. The party opposing the application may file with the clerk his objections thereto, either printed or typewritten as he may prefer, at any time before the application is decided. If the application is denied the opposing party will be entitled to tax a motion fee

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R. 216; Bourgette v. Williams, 73 Mich. 208, 41 N. W. R. 229, Snell v. Race, 78 Mich. 334, 44 N. W. R. 286; Maltby v. Plummer, 73 Mich. 539, 41 N. W. R. 683; Kent County Agricultural Society v. Houseman, 81 Mich. 609, 46 N. W. R. 15; Thayer v. Grand Rapids, 82 Mich. 298, 46 N. W. R. 228; Lambert v. Weber, 83 Mich. 395, 47 N. W. R. 251; Muskegon v Martin Lumber Co., 86 Mich. 625, 49 N. W. R. 489; DeLong v. Muskegon Booming Co., 88 Mich. 282, 50 N. W. R. 297; Hall v. Concordia Fire Ins. Co., 90 Mich. 403, 51 N. W. R. 524; Davison v. Shanahan, 93 Mich. 486, 53 N. W. R. 624; Sanford v. Rowley, 93 Mich. 509, 52 N. W. R. 1119; Maxted v. Fowler, 94 Mich. 107, 53 N. W. R. 921; Rayl v. Hammond's Estate, 95 Mich. 22, 54 N. W. R. 693; Turner v. Muskegon Machine & Foundry Co., 97 Mich. 177, 56 N. W. R. 356; Wheeler v. Meyer, 101 Mich. 465, 59 N. W. R. 811; Roby v. Gray, 73 Mich. 363, 42 N. W. R. 839.

[65] C. L. 1915, (12010); P. A. 1915, Act No. 314, Ch. 1, Sec. 5, page 4; Cummins & Beecher's Mich. Judicature Act, §172.

of fifteen dollars and the expense of printing a brief if one has been furnished.[66]

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[66] Supreme Court Rule No. 51; Cummins & Beecher's Mich. Rule Book, page 528. An application for a re-hearing based upon a showing of facts already upon the record, or that would not materially alter or add to the case made on the first hearing, will be denied; Taylor v. Boardman, 24 Mich. 287. The questions relating to the practice in the Supreme Court under this Rule, relating to re-hearings, are passed upon or referred to in the following cases: Adams v. Field, 25 Mich. 16; Case v. Case, 26 Mich. 493; Hutchins v. Kimmell, 31 Mich. 127; Detroit Savings Bank v. Truesdail, 38 Mich. 431; Vanneter v. Crossman, 39 Mich. 611; Thompson v. Denison, 40 Mich. 526; Kraft v. Raths, 45 Mich. 21; Peoples v. Evening News Association, 51 Mich. 21, 16 N. W. R. 185; Maclean v. Scripps, 52 Mich. 256, 17 N. W. R. 815; Reeg v. Burnham, 55 Mich. 56, 20 N. W. R. 708, 21 N. W. R. 431; Morgan v. Michigan Air Line R. Co., 57 Mich. 456, 25 N. W. R. 161, 26 N. W. R. 865; Smith v. Walker, 57 Mich. 484, 22 N. W. R. 267, 24 N. W. R. 830, 26 N. W. R. 783; Johnston v. Davis, 61 Mich. 278, 28 N. W. R. 98; Rossman v. Rossman, 62 Mich. 439, 29 N. W. R. 33; Brown v. Brown, 64 Mich. 83, 32 N. W. R. 633; Cobbs v. Fire Association, 68 Mich. 465, 36 N. W. R. 222; Auditor General v. Hill, 98 Mich. 329, 57 N. W. R. 168; Sherwood v. Central Mich. Savings Bank, 104 Mich. 65, 62 N. W. R. 294; McDonald v. McKinnon, 104 Mich. 429, 62 N. W. R. 560; John Hutchison Mfg. Co. v. Pinch, 107 Mich. 12, 64 N. W. R. 729, 66 N. W. R. 340; Ewing v. Ainger, 97 Mich. 381, 56 N. W. R. 767. A re-hearing on the same facts and legal controversy is not usually granted unless there has been some very peculiar assumption or defect on the first hearing by which the court and parties have been misled, and the case must be an extraordinary one in which the appellate court will revoke its decision on any other grounds. Counsel are expected to present in one argument whatever there is to be presented; and the court will act on the whole record, or so much of it as is material. Brown v. Brown, 64 Mich. 82, 31 N. W. R. 34.

# PART FIVE.

# FORMS IN DIVORCE PROCEDURE.

## PART FIVE—FORMS IN DIVORCE PROCEDURE.

No. 1. Bill of Complaint for Adultery, General Form.
No. 2. Bill for Divorce by Wife—Adultery.
No. 3. Bill for Divorce—Physical Incapacity.
No. 4. Bill for Divorce, Charging Desertion.
No. 5. Bill Alleging Desertion.
No. 6. Bill for Divorce, Charging Extreme Cruelty, and Asking for Alimony and Custody of Children.
No. 7. Bill for Divorce by Wife, Charging Habitual Drunkenness.
No. 8. Bill for Divorce From Bed and Board.
No. 9. Bill for Divorce Charging Conviction of a Felony and Sentence to the State Prison for Three Years.
No. 10. Bill for Divorce Procured by Defendant in Another State.
No. 11. Bill by Wife for Refusal to Support.
No. 12. Bill to Annul Marriage.
No. 13. Bill to Affirm Marriage.
No. 14. Chancery Summons.
No. 15. Affidavit for Order of Publication—Non-resident Defendant.
No. 16. Affidavit for Order of Publication When Process Cannot be Served.
No. 17. Order of Publication—Non-resident Defendant.
No. 18. Order of Publication—Defendant's Residence Unknown.
No. 19. Order of Publication—Defendant Concealed.
No. 20. Notice of Appearance of Defendant.
No. 21. Motion to Dismiss.
No. 22. Order Pro Confesso, for not Appearing.
No. 23. Order Pro Confesso for not Answering.
No. 24. Order Pro Confesso, Defendant Brought in by Publication.
No. 25. Affidavit of Non-Appearance.
No. 26. Affidavit of Default for Want of Answer.
No. 27. Supplemental Bill.
No. 28. Petition for Leave to File Supplemental Bill.
No. 29. Notice of Application.
No. 29a. Order Granting Leave to File Supplemental Bill.
No. 30. Answer—General Form.

No. 31. Answer and Cross-Bill.
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No. 38. Petition for Temporary Alimony and Expenses by Plaintiff.
No. 39. Petition for Alimony and Expenses by Defendant.
No. 40. Order Allowing Temporary Alimony and Expenses to Plaintiff.
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No. 42. Order Denying Temporary Alimony.
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No. 44. Affidavit to Obtain an Attachment for Non-Payment of Temporary Alimony.
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No. 46. Order for Attachment and Commitment.
No. 47. Injunction to Restrain Sale or Encumbrance of Property.
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No. 49. Decree of Divorce Reserving Question of Alimony.
No. 50. Decree of Divorce and for Alimony.
No. 51. Decree for Permanent Alimony After Divorce.
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No. 53. Decree Annulling Marriage.
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No. 60. Petition for Discharge of Decree.
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No. 66. Claim of Appeal.
No. 67. Notice of Appeal and of Application for Approval of Bond.
No. 68. Bond on Appeal.
No. 69. Case on Appeal.
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No. 71. Notice of Amendments to Case on Appeal.

# FORMS IN DIVORCE PROCEDURE.

## No. 1. Bill of Complaint for Adultery, General Form.

(See Text, §391)

STATE OF MICHIGAN.

To the Circuit Court for the County of ........, In Chancery.

............., plaintiff in this suit, complains of ........., the defendant herein, and respectfully represents unto this Honorable Court as follows:

I.

That ....he now is, and for .......... years last past, has been a resident of and domiciled in the County of .......... and State of Michigan.

II.

That on or about the ............. day of ............., A. D. 19..., ....he was duly and legally married to ................, the defendant herein, at the .......... of ........ by ..........., a ........... duly and legally authorized to solemnize marriages, and that said parties lived and cohabited together as husband and wife from the time of said marriage to the .......... day of .........., A. D. 19...

III.

That during the time said parties so lived and co-habited together as husband and wife there were born to them, the offspring of said marriage, .......... children, .......... of whom are now living and whose names and ages are as follows: ...............................................

IV.

That ....he has been informed, and verily believes, and therefore charges the truth to be, that the said defendant, disregarding the solemnity of the marriage vow and obligation, has, since said marriage, committed adultery and had illicit carnal intercourse with divers persons, whose names are at present unknown to the plaintiff, at divers times and places; but at what particular times and places the plaintiff is not at present informed.

V.

That ....he is informed and believes, and on such information and belief charges, that the said defendant is now living in adultery with one ........... at ........... in the State of ...........

VI.

That on or about the .......... day of .........., A. D. 19..., the said defendant did commit adultery and have illicit carnal intercourse with one .......... at .......... in the State of ...........

VII.

And the plaintiff positively avers that the several acts of adultery hereinbefore charged were all committed without the consent, connivance, privity or procurement of the plaintiff, and that ....he has not voluntarily co-habited with said defendant since the discovery of such adultery, and that this bill is not founded on or exhibited in consequence of any collusion, agreement or understanding whatever between the parties hereto or between the plaintiff and any other person, and further, that the said plaintiff has never been guilty of any act of adultery or misconduct, as hereinbefore charged against said defendant.

VIII.

The said plaintiff, in consideration of the premises, prays: (a) That the said defendant may be required to answer this bill of complaint without oath, (.......... answer on oath being hereby expressly waived).

(b) That the marriage between the plaintiff, .........., and the defendant, .............., may be dissolved and a divorce from the bonds of matrimony decreed according to the statute in such case made and provided.

(e) That the care, custody, control and education of said minor child...., .............., may be awarded to plaintiff, and that ....he may have such other relief, and such further relief in the premises as shall be agreeable to equity and good conscience.

................................

State of Michigan,
County of......... } ss.

.................., the above named plaintiff, being duly sworn, deposes and says that ..he has ............ read the foregoing bill of complaint, by .... subscribed, and knows the contents thereof, and that the same is true of .... own knowledge, except as to those matters which are therein stated to be on information and belief, and as to those matters .... believes it to be true. Affiant further states that there is no collusion, understanding or agreement whatever between this affiant and ......................., the defendant named in said bill of complaint, or between said affiant and any other person, in relation to said application for divorce.

................................
Plaintiff.

Subscribed and sworn to before me this ........... day of ............., A. D. 19.....

................................
Notary Public ......... County,
My Commission expires .........., 19.....

## No. 2. Bill For Divorce by Wife—Adultery.

(See Text, §394)

STATE OF MICHIGAN.
To The Circuit Court for ............ County, In Chancery.

............, plaintiff in this suit, complains of ..........., the defendant herein, and respectfully shows unto this Honorable Court as follows:

I.

That she now is and for ......... years last past has been a resident of the County of ......... and State of Michigan.

II

That on or about the ......... day of ........., A. D. ....., she was duly and legally married to ......... the defendant herein named, at ........., in the State of ........., by ........., a ........., duly and legally authorized to solemnize marriages, and that said parties lived and co-habited together as husband and wife from the time of said marriage until on or about the ......... day of ........., A. D. 19....

III.

That during the time said parties so lived and co-habited together as husband and wife, there w.... born to them ......... child...., the offspring of said marriage, ......... of whom are now living and whose names and ages are as follows: ...........................................

IV.

That she is informed and believes, and on such information and belief alleges, that the said defendant, disregarding the solemnity of his marriage vow and obligation, has, since said marriage, committed adultery and had illicit carnal intercourse with divers persons whose names are at present unknown to the plaintiff, at divers times and places; but at what particular times and places the plaintiff is not at present informed, and she asks to be permitted to amend her said bill by stating the names of such persons and the times and places when and where such acts were committed, when she shall have ascertained the same.

V.

That she is informed and believes, and on such information and belief alleges that the said defendant is now living in adultery with one ........., at ........., in the State of .........

VI.

That on or about the ......... day of ........., A. D. ...., the said defendant did commit adultery and have illicit carnal intercourse with one ........., at ........., in the State of .........

## VII.

And the plaintiff positively avers that the several acts of adultery hereinbefore charged, were all committed without the consent, connivance, privity or procurement of the plaintiff, and that she has not voluntarily co-habited with said defendant since the discovery of said adultery, and that this bill of complaint is not founded on or exhibited in consequence of any collusion, understanding or agreement whatever between the parties hereto, or between herself and any other person. And further, that she has never been guilty of any act of adultery or misconduct, as hereinbefore charged against said defendant.

## VIII.

That the said defendant is a man of low, vicious and vulgar habits, and is addicted to the use of profane and obscene language towards the plaintiff and their children, and in the presence and hearing of said children; and is a person wholly unfit to be entrusted with the care, custody and education of said children.

## IX.

That the said defendant is the owner in fee simple of the following described real estate, to-wit: ...................., of great value, to-wit: of the value of...................... Dollars; and is the owner of a large amount of personal property, consisting of......................................, of the value of ............... Dollars and upwards. That the plaintiff is poor, without means to support herself and children and to prosecute this suit; and that the said defendant is abundantly able to supply all of the necessities and wants of the plaintiff and said children, but wholly neglects and refuses to do so, and the plaintiff is now compelled to accept assistance from her relatives and friends to live and subsist from day to day; and that the plaintiff and said children are but poorly supplied with clothing and other comforts of life suitable to her and their condition in life.

## X.

That the said defendant has threatened, and she fears he will carry his threats into execution, to sell off all of his real and personal property to prevent the plaintiff from recovering alimony therefrom for the support of herself and her said children, and that the said defendant ought to be restrained by the injunction of this Honorable Court from selling, assigning, incumbering or otherwise disposing of the said property, or any part thereof, until the hearing of this cause and suitable provision is made for the support of the plaintiff and her said children.

Inasmuch, therefore, as the plaintiff is without remedy in the premises, except in a court of equity, she prays:

(a) That................., who is made party defendant to this bill, may be required to make full and direct answer to the same.

(b) That the plaintiff may be divorced and forever freed from the bonds of matrimony now existing between her and the said defendant........................

(c) That the care, custody and education of said child.... may be awarded to the plaintiff.

(d) That this Honorable Court will decree to the plaintiff such portions of the property of said defendant as may be deemed necessary and proper for the maintenance of the plaintiff and said children.

(e) That the said defendant may be required to pay to the plaintiff a sufficient sum of money to enable her to employ counsel and to prosecute this suit, and for the support of herself and said children during the pendency thereof.

(f) That the said defendant may be restrained by the injunction of this court from selling, assigning, incumbering or otherwise disposing of his said property, both real and personal, until the further order of this Court.

(g) That the plaintiff may have such other and further relief in the premises as equity may require and as to this Honorable Court may seem proper.

May it please the Court to grant unto the plaintiff the people's writ of injunction, to be directed to the said........... ..........., the defendant herein named, restraining him from selling, assigning, incumbering or otherwise disposing of any of his real and personal property until the further order of this court.

..............................
Plaintiff.

..................................

Attorney and Counsellor for Plaintiff
Business Address........................

State of Michigan, } ss.
County of }

...................., the above named plaintiff, being duly sworn, deposes and says that she has read the foregoing bill of complaint by her subscribed, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated to be upon her information and belief, and as to those matters she believes it to be true; and further, that there is no understanding, collusion or agreement whatever between the plaintiff and the defendant herein, or between the plaintiff and any other person, in regard to her application for divorce.

..................................
Plaintiff.

Subscribed and sworn to before me this.................. day of...................., A. D. 19....

..................................
Notary Public.............County

My Commission expires..............19....

## No. 3. Bill For Divorce—Physical Incapacity.

(See Text, §395)

STATE OF MICHIGAN.
To The Circuit Court For..............County in Chancery.

............., plaintiff in this suit, complains of.........., the defendant herein, and respectfully represents unto this Honorable Court as follows:

I.

That............he now is and for............years has been a resident of and domiciled in the County of.......... and State of Michigan.

II.

That on or about the.............day of.............. A. D. 19...., ...he was duly and legally married to......... ............, the defendant herein named, at the........... of................and State of...................., by ................., a................., duly authorized to solemnize marriages.

### III.

That immediately after the said marriage took place the plaintiff discovered that the said defendant, at the time of ............. intermarriage with the plaintiff, was, and has continued to be naturally impotent, and physically incapable of entering into the marriage state; that.................. (Here state fully and particularly the character of the impotency), so that said marriage could not be consummated by the sexual intercourse of the said parties; that said plaintiff did not know of and had no reason to suspect, or opportunity to discover, such impotency and physical incapacity until after the solemnization of said marriage.

### IV.

That the plaintiff is informed and believes, and so charges the fact to be, that the said impotency and physical incapacity of the said defendant existed at the time of said marriage, and that it still exists and is incurable.

### V.

The plaintiff positively avers that the acts done and cause of divorce charged herein, for which divorce is sought, were committed without the consent, connivance, privity or procurement of the plaintiff, and that such bill is not founded on or exhibited in consequence of any collusion, agreement or understanding whatever between the parties thereto, or between the plaintiff and any other person.

In consideration whereof the plaintiff prays:

(a) That the said................, the defendant herein named, may be required to answer this bill of complaint, but not on oath, (Answer on oath being hereby expressly waived).

(b) That the marriage between the plaintiff and said defendant be dissolved, and a divorce from the bonds of matrimony decreed according to the statute in such case made and provided.

(c) That the plaintiff may have such other or further relief in the premises as to the Court may seem proper and as shall be agreeable to equity and good conscience.

..............................

..............................

Attorney for Plaintiff

Business Address...............

State of Michigan } ss.
County of }

...................., the above named plaintiff, being duly sworn, deposes and says that ...he has heard read the foregoing bill of complaint by............subscribed, and knows the contents thereof, and that the same is true of............ own knowledge, except as to those matters which are therein stated to be upon information and belief, and as to those matters...... believes it to be true. Affiant further states that there is no collusion, understanding or agreement whatever between affiant and the defendant herein, or between this affiant and any other person in relation to this application for divorce.

................................
Plaintiff.

Subscribed and sworn to before me this................ day of...................., A. D. 19....

................................
Notary Public........County.

My Commission expires..............19....

## No. 4. Bill For Divorce Charging Desertion.

(See Text, §396)

STATE OF MICHIGAN.
To the Circuit Court for.............County. In Chancery.

......................Plaintiff in this suit, complains of ........................the defendant herein, and respectively shows unto this Honorable Court as follows:

I.

That ....he now is, and for.........years and upwards, last past has been, a resident of and domiciled in the County of...............and State of Michigan.

II.

That on or about the.........day of.........A. D. ...... ...he was duly and legally married to.................the defendant herein, at the.........of..........in the State of .............., by...............a..............duly and legally authorized to solemnize marriages, and that said parties lived and cohabited together as husband and wife from the time of said marriage until on or about the............day of ............A. D............., at which time the said defendant deserted the plaintiff as is more particularly hereinafter shown.

III.

That during the time said parties so lived and co-habited together as husband and wife there were born to them....... children, the offspring of said marriage........of whom are now living, and whose names and ages are as follows........
..............................

IV.

The plaintiff further represents that the said..........the defendant herein, wholly disregarding h....marriage vows and obligations afterwards, on the..........day of.........
A. D..........wilfully deserted and abandoned the plaintiff, without any reasonable cause, and against the will of the plaintiff for the period of two years and upwards, and has wilfully persisted in such desertion and still continues the same.

V.

And the plaintiff positively avers that the acts done by the said defendant, and hereinbefore charged, and for which divorce is sought were all committed without the consent, connivance, privity or procurement of the plaintiff, and that this bill of complaint is not founded on or exhibited in consequence of any collusion, agreement, or understanding whatever, between the parties hereto, or between the plaintiff and any other person.

VI.

Inasmuch, therefore as the plaintiff is without remedy in the premises, except in a Court of equity, ....he prays:

(a) That the said............who is made a party defendant to this bill may be required to answer the same fully and particularly, but without oath, answer on oath being hereby expressly waived.

(b) That the marriage between the plaintiff and the said ...............the defendant herein, may be dissolved and a divorce from the bonds of matrimony decreed, according to the statute in such case made and proved.

(c) That the plaintiff may be awarded the care, custody and education of said children, the surviving issue of said marriage.

(d) That the plaintiff may have such other or further relief in the premises as to this Honorable Court may seem proper, and as shall be agreeable to equity and good conscience.

..................................

Plaintiff.

..................................

Attorney for Plaintiff.

Business Address................

State of Michigan }
County of......... } ss.

....[illegible] T. Spear....... the above named plaintiff, being duly sworn, deposes and says that She has heard read the foregoing bill of complaint by her............subscribed, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated to be upon information and belief, and as to those matters She believes it to be true. Affiant further states that there is no collusion, understanding or agreement, whatever, between the parties hereto, or between the affiant and any other person in regard to this application for a divorce.

..................................

Plaintiff.

Subscribed and sworn to before me this............day of [illegible]......A. D. 1947.

..................................

Notary Public.

My Commission will Expire....................

3

## No. 5. Bill For Divorce, setting forth a Common Law Marriage and alleging Desertion as ground for Divorce asking for Alimony and custody of Children.

(See Text, §396)

STATE OF MICHIGAN.
To the Circuit Court for............County. In Chancery.

........................, plaintiff in this suit, complains of......................the defendant herein, and respectfully represents unto this Honorable Court as follows:

I.

That on to-wit: the..........day of................A. D. ........the said plaintiff and the said defendant entered into an agreement by which the said defendant solemnly promised and agreed to and with the said plaintiff, to take the said plaintiff as his wife, and in consideration of such promise and agreement by the said defendant, she the said plaintiff then and there promised and agreed to take the said defendant as her husband, and said parties then and there promised and agreed each to and with the other, thence forth and as long as they both should live to have and assume, each to and with the other the relation of husband and wife, and to live and cohabit together as such; that from and after said date, the said parties did live and co-habit together as husband and wife until on or about the ....... day of .......... A. D. ......, at which time the defendant deserted and abandoned the plaintiff as is more particularly hereinafter set forth.

II.

That by reason of such agreement, so made between said parties as aforesaid, and said co-habitation together of said parties as husband and wife as aforesaid, the said plaintiff became duly and legally married to said defendant, on the date aforesaid, at the..........of in the State of.............., and is still the wife of said defendant.

III.

That during the time said parties so lived and co-habited together as husband and wife as hereinbefore set forth, there were born to said parties, as the issue of said intermarriage, ............children,............of whom are now living and whose names and ages are as follows,.................. .........................

IV.

The plaintiff further represents that the said............, the defendant herein, wholly regardless of his marriage covenants and obligations, afterwards and on the..........day of........A. D......., wilfully deserted the plaintiff, against her will, and absented himself from her continuously for the period of two years and upwards, and during all of said time has persisted in such desertion and abandonment of the plaintiff, and still continues and persists in the same without any reason or cause whatever.

V.

The plaintiff positively avers that the acts done by the said defendant, and hereinbefore charged, for which divorce is sought, were all committed without the consent, connivance, privity, or procurement of the plaintiff, and that this bill of complaint is not founded on or exhibited in consequence of any collusion, understanding or agreement whatever, between the parties hereto, or between the plaintiff and any other person.

VI.

Inasmuch therefore, as the plaintiff is without remedy in the premises, except in a Court of equity, she prays:

(a) That the said..................who is made a party defendant herein, may be required to make full and direct answer to all and singular the matters and things herein charged, but not on oath, his answer on oath being hereby expressly waived.

VII.

(b) That the said marriage between the said defendant ........................and the plaintiff be dissolved, and a divorce from the bonds of matrimony decreed, according to the statute in such case made and provided.

(c) That the plaintiff may be awarded the care, custody and education of the said children,.................... the surviving issue of said marriage.

(d) That the plaintiff may have such other or such further relief in the premises as to the Court may seem proper, and as shall be agreeable to equity and good conscience.

..............................

Plaintiff.

..............................

Attorney for Plaintiff.

Business Address...............

State of Michigan }
County of......... } ss.

............................., The above named plaintiff, being duly sworn deposes and says that she has heard read the foregoing bill of complaint by her subscribed, and knows the contents thereof, and that the same is true of her own knowledge, except as to those matters which are therein stated to be upon her information and belief and as to those matters she believes it to be true. Affiant further states that there is no collusion, understanding, or agreement whatever, between the parties hereto, or between affiant and any other person in relation to her application for divorce.

....................................
Plaintiff.

Subscribed and sworn to before me this......day of...... A. D.......

....................................
Notary Public.

My Commission will expire,......................

## No. 6. Bill For Divorce Charging Extreme Cruelty and Asking For Alimony and Custody of Children.

(See Text, §394)

STATE OF MICHIGAN.
To the Circuit Court for............County. In Chancery.

........................, plaintiff in this suit, complains of .......................the defendant herein, and respectfully shows unto this Honorable Court as follows:

I.

That she now is, and for more than two years last past has been a resident of, and domiciled in the County of.......... and State of Michigan.

II.

That on or about the..........day of..........A. D......, she was duly and legally married to........................., the defendant herein, at the............of............in the

State of................, by............................a Minister of the gospel, duly and legally authorized to solemnize marriages, and that said parties lived and co-habited together as husband and wife from the time of such intermarriage until on or about the............day of............A. D......, at which time the plaintiff was compelled to leave the defendant on account of his cruel and inhuman treatment of her, as is more particularly hereinafter set forth.

### III.

That during the time the said parties so lived and co-habited together as husband and wife, and up to the time of exhibiting this, the said plaintiff's bill of complaint, the said plaintiff bore to the said defendant...............children, the issue of said marriage,..........of whom are now living and whose names and ages are as follows..................

### IV.

That the said......................., the defendant herein, disregarding the solemnity of his marriage vows and obligation, ever since said marriage and especially during the past ........years, has been guilty of extreme and repeated cruelty toward the plaintiff, that is to say, that the said defendant, on divers and frequent days and times since said marriage has cruelly beaten and struck, kicked and choked her, and has neglected and refused to furnish her and her said children with proper food and clothing, and has frequently used vile, obscene and profane language toward her, and has frequently accused her of unchastity, without any reason or cause whatever; and particularly, on or about the.......day of........ A. D......., the said defendant assaulted and beat the plaintiff and called her vile and obscene names and used toward her language too vile and obscene to be spread upon the records of this Court.

### V.

That on or about the..........day of..............A. D. ......, the said defendant became enraged at the plaintiff and called her vile names and choked her and beat and ill-used her so that she was sick for a long time and was compelled to have the attendance of physicians for several days.

### VI.

That during all of the time said parties lived and co-habited together as husband and wife, she always treated the defendant with kindness and consideration and performed all of her wifely duties, and tried and employed her best efforts to please the defendant, but without avail, and his conduct toward her became so cruel and inhuman that it was no longer safe for her to live and co-habit with him as his wife, and fearing to longer live with him, on account of his cruel conduct, she took her........young children and left him on or about the........day of..............A. D........, and has not since lived with him.

### VII.

That since the plaintiff left said defendant he has continued to annoy and abuse her, and has threatened to take said children from her by force, and to kill the plaintiff if she refuses to let him have said children or attempts to prevent him from taking them from her, and she fears and believes, and has good reason to fear and believe that he will carry said threats into execution if not restrained from so doing by the injunction of this Court.

### VIII.

That the said defendant is possessed of real estate of the value of..............dollars and upwards, and of personal property of the value of..............dollars and upwards, besides the household goods used by said parties during the time they lived together, and he is well able to furnish the plaintiff and her said children with a comfortable living and support, but neglects and refuses to do so; that he threatens and the plaintiff fears that he will carry such threats into execution, to sell his said property and said household goods, or otherwise incumber and dispose of the same to prevent the plaintiff from recovering alimony for the support of herself and children, unless he shall be restrained from so doing by the injunction of this Court.

### IX.

The plaintiff positively avers that the acts done by said defendant as hereinbefore set forth, and for which divorce is sought, were all committed without the consent, connivance, privity or procurement of the plaintiff, and that this bill of complaint is not founded on or exhibited in consequence of any collusion, understanding or agreement between the parties hereto, or between the plaintiff and any other person; and that she, the said plaintiff has never been guilty of any of the acts herein charged against said defendant.

## X.

In consideration whereof, and inasmuch as the plaintiff is without remedy in the premises, except in a court of equity, she prays:

(a) That the said defendant may be required to answer this bill of complaint fully and particularly, but not on oath, his answer on oath being hereby expressly waived.

(b) That the marriage between the plaintiff and the defendant may be dissolved, and a divorce from the bonds of matrimony decreed, according to the statute in such case made and provided.

(c) That the plaintiff may be awarded the care, custody and education of said minor children, the surviving issue of said marriage.

(d) That this Honorable Court will decree to the plaintiff the said household furniture and such sums of money to be paid by the defendant to her, in such sums and at such times as this Honorable Court may direct, and sufficient to enable her to employ counsel and to prosecute this suit, and to support herself and children during the pendency thereof.

(e) That on the final hearing of this cause the Court will award to the plaintiff such sums of money or property of the defendant as may be proper as permanent alimony for the support of said plaintiff and her said children.

(f) That the said defendant may be restrained by the order and injunction of this honorable Court, from selling, incumbering, assigning, or otherwise disposing of any of his real and personal property and said household goods, and from interfering in any manner with the plaintiff or said children and from taking or attempting to take said children from the custody and control of the plaintiff by force or otherwise until the further order of this Court.

(g) That the plaintiff may have such other or further relief in the premises as to this honorable Court may seem proper and as shall be agreeable to equity and good conscience.

May it please the Court, the premises being considered to grant unto the plaintiff the people's writ of injunction, restraining the said defendant from selling, assigning, incumbering or otherwise disposing of any of his real or personal property and household goods, and from in any manner interfering with the plaintiff or said children, and from taking or attempting to take said children from the custody and control of said plaintiff by force or otherwise until the further order of this Court.

..............................

Plaintiff.

..............................

Attorney for Plaintiff.

Business Address..................

State of Michigan } ss.
County of.........

........................, the above named plaintiff being duly sworn deposes and says that she has heard read the foregoing bill of complaint by her subscribed and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated to be upon her information and belief, and as to those matters she believes it to be true.

This affiant further on oath states that there is no collusion, understanding or agreement whatever between the parties, hereto, or between this affiant and any other person in relation to her application for divorce.

..............................

Plaintiff.

Subscribed and sworn to before me this...........day of ............A. D. 19....

..............................

Notary Public.

My Commission will Expire,.......................

## No. 7. Bill for Divorce by Wife Charging Habitual Drunkenness.

(See Text, §397)

STATE OF MICHIGAN.

To the Circuit Court for the County of....... In Chancery.

......................., Plaintiff in this suit, complains of

..........................the defendant herein, and respectfully shows unto the Court as follows:

I.

That she now is, and for more than...........years has been a resident of and domiciled in the County of........... and State of Michigan.

II.

That on or about the...........day of...............A. D. ........, she was duly and legally married to.............. ............., the defendant herein, at.............. in the State of................, and the name which she bore prior to said marriage was.......................

III.

That from and after said marriage said parties lived and co-habited together as husband and wife until on or about the.........day of.................A. D. 19...., at which time the plaintiff was compelled to leave the defendant because of his habitual drunkenness, and cruelty toward the plaintiff as is more particularly hereinafter set forth.

IV.

That during the time said parties so lived and cohabited together as husband and wife, and up to the time of exhibiting this the plaintiff's bill of complaint, she bore unto said defendant.........children, the issue of said marriage, .......... of whom are now living, and whose names and ages are as follows:...............................

V.

That since said marriage the said defendant disregarding the solemnity of his marriage vows and obligations has become an habitual drunkard, and during the past........... years has squandered his property and earnings in drinking and carousing, and has neglected and misused the plaintiff and their children, to that extent that it is no longer safe or proper for the plaintiff and said children to live with him.

VI.

That at the time of said marriage the defendant was a temperate and industrious man, and for several years continued to so remain, during which time he accumulated considerable property, by his labor and with the assistance of the plaintiff, amounting to upwards of.........dollars; that about...... years prior to the exhibiting of this bill of complaint, the defendant, against the advice and remonstrances of the plaintiff commenced the use of intoxicating liquors, and has ever since been in the habit of getting intoxicated, and for the past ........years has become beastly drunk every time he was where he could procure liquor, and for a considerable period of time before the plaintiff left him he was drunk every day; that when under the influence of liquor the defendant was cross and ugly toward the plaintiff and their children and frequently beat and otherwise abused them in a most cruel and inhuman manner.

VII.

That during all of the time said defendant was acquiring the liquor habit, the plaintiff tried to dissuade him from the use of liquor, and in a kindly manner advised him to break away from the pernicious habit, but without avail; that the habit continued to grow more fixed as time continued until said defendant has become such an habitual drunkard that he is entirely unfit to have charge of his family and property.

VIII.

That the defendant has squandered and spent a large portion of his property in drinking and carousing, but is still the owner of the following described real estate................ ....................which the plaintiff is informed and believes is of the value of...............dollars, and of personal property of the value of...........dollars and upwards; and said defendant is abundantly able to support the plaintiff and their said children out of said property but neglects and refuses to do so.

IX.

That the plaintiff is poor, and has no means of support of herself and children and no means with which to employ counsel and to prosecute this suit, other than her daily labor at menial work; that she is in very poor health and unable to work much of the time, and requires the services of a physician, but has no means with which to pay for such services; that she is but poorly supplied with clothing for herself and children, and is obliged to keep said children out of school because of their not having suitable and comfortable clothing.

### X.

That she is informed and believes and therefore alleges the fact to be that the defendant is still squandering his property and the income therefrom in drinking and carousing, and has threatened to sell, incumber, or dispose of such property to prevent the plaintiff from recovering alimony for the support of herself and children, and the plaintiff fears that he will carry such threats into execution, unless restrained from so doing by the injunction of this Court.

### XI.

The plaintiff positively avers that the acts done and causes for divorce hereinbefore set forth, and for which divorce is sought, were all committed without the consent, connivance, privity or procurement of the plaintiff, and that this bill of complaint is not founded on or exhibited in consequence of any collusion, understanding or agreement whatever, between the parties hereto, or between the plaintiff and any other person; and that the plaintiff has never been guilty of any of the acts herein charged against the defendant.

### XII.

In consideration whereof, and inasmuch as the plaintiff is without remedy in the premises, except in a Court of equity, she prays:

(a) That the defendant be required to answer all and singular the matters and things herein charged, but not on oath, his answer on oath being hereby expressly waived.

(b) That the marriage between the plaintiff and the defendant be dissolved and a divorce from the bonds of matrimony decreed, according to the statute in such case made and provided.

(c) That the care, custody and education of said children may be awarded to the plaintiff.

(d) That the defendant may be required by the order and decree of this Honorable Court to pay to the plaintiff a sufficient sum of money for temporary alimony and expenses as will enable her to employ counsel and prosecute this suit, and to support herself and children and provide them with clothing during the pendency thereof.

(e) That upon the final hearing of this cause the court will decree to be paid to the plaintiff by the defendant such sufficient sums of money as may be necessary for the support of the plaintiff and her said children, as permanent alimony for such purpose.

(f) That the defendant may be restrained from selling, assigning, incumbering, or otherwise disposing of his said property or any part thereof until the further order of this Honorable Court.

(g) That the plaintiff may have such further or other relief in the premises, as to the Court may seem proper, and as shall be agreeable to equity and good conscience.

May it please the Court, the premises being considered, to grant unto the plaintiff, the people's writ of injunction, directed to the defendant, restraining him from selling, assigning, incumbering or otherwise disposing of any of his said property until the further order of this Court.

..........................
Plaintiff.

..........................
Attorney for plaintiff,
Business Address ......................

State of Michigan }
County of ........ } ss.

......................., the above named plaintiff, being duly sworn, deposes and says that she has heard read the foregoing bill of complaint, by her subscribed, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated to be upon her information and belief, and as to those matters she believes it to be true. Affiant further on oath states that there is no collusion, understanding or agreement whatever between the parties hereto, or between the affiant and any other person in relation to her application for divorce.

..........................
Plaintiff.

Subscribed and sworn to before me this .......... day of ............., A. D. 19....

............................

Notary Public.

My Commission will expire..................

### No. 8. Bill for Divorce From Bed and Board.

State of Michigan.
The Circuit Court for ............... County.—In Chancery.
To the Court:

........................., plaintiff in this suit, complains of ...................., the defendant herein, and respectfully shows unto this Honorable Court as follows:

I.

That she is a resident of and domiciled in the said County of ................. and has had her residence and domicile in the state of Michigan for the period of ........ years and upwards, immediately preceding the time of exhibiting this her bill of complaint.

II.

That heretofore and on or about the .............. day of .............. A. D. .........., the plaintiff whose maiden name was ............., was lawfully married to ........... the defendant herein, at the ............ of .......... and State of .............; and that she continued to live and co-habit with said defendant as his wife from the time of the said marriage until on or about the .............. day of .............. A. D. ........, when the plaintiff was compelled to leave the defendant, on account of his extreme and repeated cruelty, toward the plaintiff and her children, and on account of his refusal to provide a suitable maintenance for the plaintiff and their children as hereinafter set forth.

III.

That during the time said parties so lived and co-habited together as husband and wife, and up to this the time of exhibiting this bill of complaint, the plaintiff bore unto the defendant ........ children ........ of whom are now living and whose names and ages are as follows, ..................

### IV.

That during all of the time the plaintiff and defendant lived and cohabited together as husband and wife, the plaintiff faithfully discharged all of her duties as such wife. But the defendant, disregarding the obligations of his marriage vow, and his duty to treat the plaintiff with kindness and affection, within a few months after their marriage commenced a course of unkind, cruel and brutal treatment towards her, which continued until she was finally compelled to and did separate from him on the .......... day of .......... A. D. ........., and that on divers occasions while she so lived and co-habited with him as his wife, the defendant was guilty of extreme and repeated cruelty towards her, in this: (Set forth the several acts of cruelty, and the language used by the defendant fully and particularly, giving time and place as near as may be).

### V.

That the defendant is a man of violent and ungovernable temper, and on many occasions during the time when she lived and co-habited with him as his wife, he addressed her with vile, opprobrious, profane and obscene language and epithets, too vile, profane and obscene to be here repeated, accompanied with threats of personal violence, and that in consequence of such cruel and inhuman treatment it has become unsafe for her to live or remain with him, and by reason thereof she was compelled to and did leave him as hereinbefore stated, and was compelled to seek refuge with her friends and relations, and since which time she has not dared and still does not dare to return to the defendant's house or to live with him.

### VI.

The plaintiff further represents unto this honorable Court that during all of the time that she lived and co-habited with the defendant as his wife, he the said defendant neglected and refused to provide for the plaintiff a suitable maintenance, and during the .......... years before said separation the plaintiff was compelled to do menial work for other people in order to earn a support and provide clothing for herself and children; that said defendant still refuses to provide anything for the support of the plaintiff and her children although he now is, and during all of the time they so lived together was abundantly able to do so.

## VII.

That the said defendant is not a proper person to have the care, custody and education of said minor children, (name them) for the reason that (State the reasons).

## VIII.

That the defendant is a man of considerable property and is the owner and possessed of real and personal estate of the value of .......... dollars as the plaintiff is informed and believes, and that his annual income is upwards of .......... dollars as she is also informed and believes; and that said defendant is a strong healthy man, and abundantly able to provide a suitable maintenance for the plaintiff and said children, and that the plaintiff has no property or income of her own, and is now entirely dependent upon the charity of her friends.

## IX.

The plaintiff positively avers that the acts done by said defendant and herein charged as cause for divorce from bed and board, were all committed without the consent, connivance, privity or procurement of the plaintiff, and that this bill is not founded on or exhibited in consequence of collusion, agreement, or understanding whatever between the parties hereto or between the plaintiff and any other person, and that she, the plaintiff has never been guilty of any such acts or misconduct as are herein charged against said defendant.

## X.

In consideration whereof, and inasmuch as the plaintiff is without remedy except in a Court of equity, she prays:

(a) That the defendant may be required to answer this bill of complaint, fully and particularly, but not on oath, his answer on oath being hereby expressly waived.

(b) That a limited divorce from bed and board forever may be decreed between the plaintiff and the defendant, but that the bonds of matrimony be not otherwise dissolved.

(c) That the plaintiff may have the care, custody and education of the said minor children, the issue of said marriage, until the further order of the Court.

(d) That the defendant may be decreed to pay to the plaintiff such sum or sums of money at such times and in such amounts as to this Honorable Court may seem proper, and sufficient to furnish a suitable support and maintenance for the plaintiff and said children, and that the same be decreed to be a lien on the real estate of the defendant, unless otherwise secured as this Court may direct.

(e) That the plaintiff may have such further or other relief in the premises as shall be agreeable to equity and good conscience.

..........................

Plaintiff.

..........................

Attorney for Plaintiff.

Business Address ......................

State of Michigan
County of ......... } ss.

...................., the above named plaintiff, being duly sworn, deposes and says that she has heard read the foregoing bill of complaint, by her subscribed, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated to be upon her information and belief, and as to those matters she believes it to be true. Affiant further on oath states that there is no collusion, understanding or agreement whatever between the parties hereto, or between the affiant and any other person in relation to her application for divorce.

..........................

Plaintiff.

Subscribed and sworn to before me this .......... day of ...........A. D.......

..........................

Notary Public.

My Commission will expire..................

## No. 9. Bill for Divorce Charging Conviction of a Felony and Sentence to the State Prison for Three Years.

STATE OF MICHIGAN.

To The Circuit Court For The County of......, In Chancery.

.............. Plaintiff in this suit, complains of ........

the defendant herein, and respectfully represents unto this Honorable Court as follows:

I.

That she now is, and for more than ....... years last past has been a resident of, and domiciled in the County of ...... and State of Michigan.

II.

That on or about the ...... day of .......... A. D. ...... she was duly and legally married to .......... the defendant herein named, at ............... and State of ............, and that the name of the plaintiff, which she bore prior to said marriage was ........................

III.

That she lived and co-habited with said defendant as his wife from the time of said marriage until the ........ day of ........A. D. ........ during which time ........ children were born to said parties, the issue of such marriage.

IV.

That on or about the ...... day of ........ A. D. ......, at the ...... of ........ in the County of ...... and State of Michigan, at a term of the Circuit Court for said County of ........ Before the Honorable ............. Judge of said Court, the said defendant was duly convicted of the crime of burglary, the same being a felony and punishable by imprisonment in the State Prison, and was then and there by the judgment of that Court, sentenced to confinement in the state prison or penitentiary of the State aforesaid for the term of three years, at hard labor, which said sentence and judgment still remains in full force and effect, not reversed, annulled or vacated, and not appealed from, and the time for appealing therefrom has expired, as by the records and proceedings in said Court now remaining, reference being thereto had, will more fully appear.

V.

The plaintiff positively avers that acts done, and herein charged, for which divorce is sought, were all committed without the consent, connivance, privity, or procurement of the plaintiff, and that this bill is not founded on, or exhibited in consequence of any collusion, agreement, or understanding whatever, between the parties hereto, or between the plaintiff and any other person.

VI.

In consideration whereof, the plaintiff prays:

(a) That ........................ the defendant hereinbefore named may be required to answer this bill of complaint, without oath, his answer on oath being hereby expressly waived.

(b) That the marriage between the plaintiff and the defendant be dissolved, and a divorce from the bonds of matrimony decreed, according to the statute in such case made and provided.

(c) That the plaintiff may by the decree of this Honorable Court, be permitted to resume the name of ................. which she bore prior to said marriage.

(d) That the plaintiff may have such further or such other relief in the premises as to the Court may seem proper and as shall be agreeable to equity and good conscience.

..................................

Plaintiff.

..............................

Attorney for Plaintiff.

Business Address, ..............................

State of Michigan
County of ........ } ss.

......................, the above named plaintiff, being duly sworn deposes and says that she has heard read the foregoing bill of complaint, by her subscribed and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated to be upon her information and belief and as to these matters she believes it to be true. Affiant further states that there is no collusion, understanding or agreement whatever, between this affiant and the defendant to said bill, or between this affiant and any other person, in relation to her application for a divorce.

...............................

Plaintiff.

Subscribed and sworn before me this ....... day of .......
A. D. 19....

....................................
Notary Public.

My Commission will expire .......................

## No. 10. Bill for Divorce Procured by Defendant in Another State.

(See Text, §397)

STATE OF MICHIGAN.
To the Circuit Court for the County of ........ In Chancery.

........................., plaintiff in this suit, complains of ........................ the defendant herein, and respectfully shows unto this Honorable Court as follows:

I.

That she now is, and for ........ years last past has been a resident of and domiciled in the said County of ........... and State of Michigan.

II.

That on or about the ........... day of ...........A. D. ...... she was duly and legally married to.................. the defendant herein named, at the .................. of .................. in the State of .................., by ........................, a minister of the gospel duly and legally authorized to solemnize marriages in said state and elsewhere; and that she lived and co-habited with said defendant as his wife from the time of said marriage until on or about the ........... day of ...........A. D. ......, at which time the said defendant deserted the plaintiff and left the state of Michigan as is more particularly hereinafter shown.

III.

That during the time said parties so lived and co-habited together as husband and wife, and up to the time of exhibiting this, the plaintiff's bill of complaint, she bore unto said defendant, as the issue of said marriage ......... children, ........ of whom are now living, and whose names and ages are as follows: ..................................

IV.

That the said defendant, disregarding the solemnity of his marriage vow, on or about the .......... day of ............ deserted and abandoned the plaintiff without any reason or cause whatever, and went to the state of........, and on or about the ........... day of ............ A. D. ......., without any valid reason or cause whatsoever procured a divorce from the bonds of matrimony from the plaintiff in this suit in the Circuit Court for the County of .................., and State of ........., which said judgment or decree of divorce from the bonds of matrimony was rendered by a Court having competent jurisdiction to grant such decree; that said decree of divorce is still in full force and effect, not annulled, reversed or in any manner vacated and has become absolute under the laws of said state.

V.

That the said defendant is the owner of real and personal property in this state and elsewhere, which as the plaintiff is informed and believes is of the value of ............ dollars and upwards, and that said defendant by fraud and misrepresentation procured said decree of divorce, without any just cause or reason therefor, and for the express purpose of preventing the plaintiff from recovering or having any alimony or support from him, and for the purpose of depriving the plaintiff of any interest in his said property.

VI.

That the plaintiff is poor and has no means of support for herself and children except what little she can earn at menial labor, and although the defendant is abundantly able so to do, he neglects and refuses and for a long period of time has neglected and refused to furnish the plaintiff with any means of support whatever for the maintenance of herself and children, and she has been compelled to rely on the charity of friends to aid in their care and support.

VII.

The plaintiff further represents that the defendant is the owner of real estate situated in the Township of ............ County of ................., and state of Michigan, and particularly described as follows: (Describe the land by government subdivision or number of lot if in city or village, as fully as in a deed). Which said real estate the plaintiff is informed and believes is of the value of ............. dollars and upwards.

VIII.

The plaintiff positively avers that the acts done and causes of divorce herein charged, and for which divorce is sought were all committed without the consent, connivance, privity, or procurement of the plaintiff, and that this bill of complaint is not founded on or exhibited in consequence of any collusion, understanding or agreement whatever between the parties hereto, or between the plaintiff and any other person.

IX.

In consideration whereof, and inasmuch as the plaintiff is without remedy in the premises, except in a Court of equity, she prays:

(a) That the said defendant may be required to answer this bill of complaint, fully and particularly, but not on oath, his answer on oath being hereby expressly waived.

(b) That the said marriage between the plaintiff and the defendant may be dissolved, and a divorce from the bonds of matrimony decreed, according to the laws of the state of Michigan in such case made and provided.

(c) That the plaintiff may have the care, custody and education of said minor child....,until the further order of this Court.

(d) That the said defendant may be required to pay to the plaintiff such sum of money as may be necessary for the support of the plaintiff and said children, and that the same be decreed to be a lien on the above described land of the defendant until paid, or otherwise secured.

(e) That the plaintiff may have such further or other relief in the premises as shall be agreeable to equity and good conscience.

..............................

Plaintiff.

..............................

Attorney for Plaintiff.

Business Address ...........................

State of Michigan }
County of ......... } ss.

........................, the above named plaintiff, being duly sworn deposes and says that she has heard read the foregoing bill of complaint, by her subscribed and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated to be upon her information and belief, and as to those matters she believes it to be true. Affiant further on her oath says that there is no collusion, understanding or agreement between the parties hereto, or between affiant and any other person in relation to her application for divorce.

..................................

Plaintiff.

Subscribed and sworn to before me this....... day of ..... A. D. 19....

..................................

Notary Public.

My Commission will expire ......................

## No. 11. Bill by Wife for Refusal to Support.

(See Text, §398)

STATE OF MICHIGAN.
To the Circuit Court for............County.—In Chancery.

......................., the plaintiff in this suit, complains of ......................., the defendant herein, and respectfully represents unto this Honorable Court as follows:

I.

That on or about the ........... day of ............A. D. ........, at the .............. of ................. in the State of ..............., she was duly and legally married to ......................., the defendant herein named, by ......................., a minister of the gospel, duly and legally authorized to solemnize marriages, and that she lived and co-habited with said defendant as his wife from the time of such marriage until on or about the ............ day of ................A. D. ........, at which time she was compelled to leave said defendant because of his neglect and refusal to furnish her with proper support and maintenance as is more particularly hereinafter set forth.

## II.

That the said plaintiff now is, and for ........ years and upwards has been a resident of and domiciled in the said county of ............... and State of Michigan, and said defendant is a resident of and domiciled in the County of .......... and State of ....................

## III.

That during the time she so lived and cohabited with the defendant as his wife, she bore to said defendant, as the issue of said marriage ........... children, ..........., of whom are now living and whose names and ages are as follows: ........ ....................

## IV.

That for a period of ......... years and upwards next preceding the time of said separation, the said defendant, disregarding the solemnity of his marriage vow, neglected and refused to furnish the plaintiff with a proper means of support and maintenance for herself and said children, although of sufficient ability so to do.

## V.

That for the period of ........ years prior to the time of exhibiting this, the plaintiff's bill of complaint, the said defendant has utterly refused to provide the plaintiff with the common necessities of life and still refuses so to do.

## VI.

That the said defendant is strong and healthy, and possessed of good natural abilities, and is well able to earn good wages and large sums of money at his trade or occupation of...... ......................., and that he is possessed of both real and personal property from which he realizes a good income, and amply sufficient to enable him to furnish the plaintiff and said children with proper support and maintenance, but absolutely refuses so to do. That he spends the most of his time with his boon companions when not at work, coming to his home only occasionally and then staying only a short time.

VII.

The plaintiff further represents that she is in poor health, and unable to do more than to care for her ......... young children; that during the last ......... months she has been obliged to rely on the charity of friends and neighbors for the common necessities of life; that she is utterly destitute of the common necessities of life, and the said defendant, well knowing the necessities of the plaintiff, and being abundantly able to relieve such necessities, utterly refuses to provide for the plaintiff and her children.

VIII.

That the defendant is the owner, and possessed of the following described real estate ............... as the plaintiff is informed and believes of the value of ........... dollars, and of personal property of the value of ........... dollars, from which he receives a good income, and that the plaintiff has no property whatever and no income from which to employ counsel and pay the expense of prosecuting this suit, and to support herself and children during the pendency thereof.

IX.

The plaintiff positively avers that the acts done, and cause of divorce charged in this bill of complaint, for which divorce is sought, were all committed without the consent, connivance, privity or procurement of the plaintiff, and that this bill is not founded on or exhibited in consequence of any collusion, understanding, or agreement whatever, between the parties hereto or between the plaintiff and any other person.

X.

In consideration whereof, and inasmuch as the plaintiff is without remedy in the premises, except in a Court of equity, she prays:

(a) That the defendant may be required to answer this bill of complaint, fully and particularly, but not on oath, his answer on oath being hereby expressly waived.

(b) That the marriage between the plaintiff and the defendant may be dissolved, and a divorce from the bonds of matrimony decreed, according to the statute in such case made and provided.

(c) That the plaintiff may have the care, custody and education of said minor children ............ and ............, the surviving issue of said marriage until they shall respectively attain the age of fourteen years and until the further order of this Honorable Court.

(d) That the Court may decree to the plaintiff such sums of money as will enable her to employ counsel, pay the expense of prosecuting this suit, and support the plaintiff and said children during the pendency thereof.

(e) That on the final hearing of this cause the said defendant may be required, by the order and decree of this Honorable Court, to pay to the plaintiff such sums of money as permanent alimony as will enable the plaintiff to support herself and said children and that the same be made a lien on the real estate of said defendant, unless otherwise secured in such manner as may be approved by this Court.

(f) That the plaintiff may have such other or further relief in the premises as may be agreeable to equity and good conscience.

..................................

Plaintiff.

..................................

Attorney for Plaintiff.

Business Address ..................................

State of Michigan } ss.
County of......... }

........................, the above named plaintiff, being duly sworn, deposes and says that she has heard read the foregoing bill of complaint by her subscribed and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated to be upon her information and belief, and as to those matters she believes it to be true. Affiant further, on her oath says that there is no collusion, understanding, or agreement whatever between the parties hereto, or between this affiant and any other person in relation to her application for divorce.

..................................

Plaintiff.

Subscribed and sworn to before me this ...... day of...... A. D. 19....

.................................

Notary Public.

My Commission will expire ........................

## No. 12. Bill to Annul Marriage.

(See Text, §403)

STATE OF MICHIGAN.
To the Circuit Court for .......... County.—In Chancery.

......................., plaintiff in this suit, complains of ......................., the defendant herein, and respectfully represents unto this Honorable Court, as follows:

I.

That the said plaintiff now is, and for more than........ years last past has been a resident of, and domiciled in the County of .............., and state of Michigan.

II.

That on or about the ............ day of .......... A. D. ......, at the ............ of ............ in the State of .............., she was married in form of law, but not in legal effect to ...................... the defendant herein named.

III.

That at the time of said pretended marriage, the said defendant represented to the plaintiff that he was an unmarried man, and the plaintiff relying upon said representations, honestly and in good faith believed them to be true and that said defendant was an unmarried man and legally competent to contract a lawful marriage with the plaintiff.

IV.

That the plaintiff and the defendant lived and co-habited together from the time of said marriage until on or about the ............ day of ............A. D.........., during all of which time the plaintiff honestly and in good faith believed that she was the lawful wife of said defendant.

### V.

That on or about the ........... day of .......... A. D. ......, the plaintiff learned that the defendant, at the time of his pretended marriage to the plaintiff, had a lawful wife then living at ................, in the state of ............. whose name is ...................., and who is still living at .............., in the state of .............., and whose marriage to the said defendant has never been annulled or dissolved, but is still in full force and effect, and the said ...... ...........is still the lawful wife of the said defendant.

### VI.

That the plaintiff is informed and believes that the said defendant was duly and legally married to the said ........... at the ........... of ............ in the State of ......... on or about the ........ day of ........ A. D......., several .......... prior to his pretended marriage to the plaintiff and that as soon as she learned of the said former marriage of said defendant and that his lawful wife was still living and not divorced from him she left the said defendant and has not since lived or co-habited with him.

### VII.

The plaintiff positively avers that the acts done, and cause for annulment of said pretended marriage between the plaintiff and the defendant, herein charged and for which a decree of annulment is sought, were all committed without the consent, connivance, privity or procurement of the plaintiff, and that this bill is not founded on or exhibited in consequence of any collusion, understanding or agreement whatever between the parties hereto, or between the plaintiff and any other person.

### VIII.

In consideration whereof, and inasmuch as the plaintiff is without remedy in the premises, except in a Court of equity, she prays:

(a) That the said defendant may be required to answer this bill of complaint, fully and particularly as to all of the matters and things herein charged, but not on oath, his answer on oath being hereby expressly waived.

(b) That said pretended marriage between the plaintiff and the defendant, be declared to be null and void, and a decree annulling the same entered, releasing the plaintiff of and from any obligation because of the same.

(c) That the plaintiff may have such other or further relief in the premises as shall be agreeable to equity and good conscience.

.................................
Plaintiff.

.................................
Attorney for Plaintiff.

Business Address ................................

State of Michigan }
County of ........ } ss.

........................, the above named plaintiff, being duly sworn deposes and says that she has heard read the foregoing bill of complaint by her subscribed, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated to be upon her information and belief, and as to those matters she believes it to be true. Affiant further, on oath says that there is no collusion, understanding, or agreement between the parties hereto, or between the affiant and any other person in relation for application for the annulment of the pretended marriage set forth in said bill of complaint.

.................................
Plaintiff.

Subscribed and sworn to before me this .......... day of ...........A. D. 19....

.................................
Notary Public.

My commission will expire .........................

## No. 13. Bill to Affirm Marriage.

(See Text, §404)

STATE OF MICHIGAN.
The Circuit Court for ............. County.—In Chancery.

........................, plaintiff in this suit, complains of the defendant herein, and respectfully represents unto this Honorable Court as follows:

I.

That she now is, and for ........ years and upwards has been a resident of and domiciled in the said County of ...... and State of Michigan.

II.

That on or about the ......... day of ......... A. D....., at the ........... of ........... in the State of Michigan, she was duly aud legally married to ........................ the defendant herein named, but not by any formal ceremony of solemnization by a minister of the gospel or other person authorized by the statutes of this state to solemnize marriages; that on the date aforesaid and at the place aforesaid the plaintiff and the defendant entered into an agreement, each with the other by which the defendant solemnly promised and agreed to take the plaintiff as his wife, in consideration whereof, the said plaintiff solemnly promised and agreed to take the defendant as her husband, and said parties then and there mutually promised and agreed that from thenceforth, as long as they both should live, to live and cohabit together as husband and wife; and from the date aforesaid the said plaintiff and said defendant did live and cohabit together as husband and wife until on or about the ........... day of ............A. D......., at which time the said defendant abandoned the plaintiff and refused to longer live and cohabit with her as husband and wife, and then and there informed the plaintiff that they were never married, and that she was not his wife and denied, and still denies said marriage, and refused and still refuses to recognize the plaintiff as his wife.

III.

That during the time said parties so lived and cohabited together as husband and wife, and up to the time of exhibiting this the plaintiff's bill of complaint, the plaintiff has borne to the defendant ......... children, ......... of whom are now living, and whose names and ages are as follows: .......... ........................; that said defendant denies the validity of said marriage and denies that the plaintiff has or ever can have any interest in his property, inchoate or otherwise, and denies that said children are his legitimate heirs although admitting the fact to be that he is the father of them, but he avers that they are bastards because born of a meretricious connection and relation between himself and the plaintiff, the father and mother of said children.

## IV.

The plaintiff positively avers that at the time she so entered into said contract and agreement of marriage with said defendant, he objected to the solemnization of said marriage in the form and by the ceremonies prescribed by the laws of this state, and assured the plaintiff that their agreement to take each other as husband and wife constituted such marriage, and that the same was in all respects as lawful as though consummated by the usual marriage ceremonies performed by a minister of the gospel or other person or official lawfully authorized to solemnize marriages, which assurances the plaintiff believed and relied on, or she never would have lived and cohabited with said defendant as his wife.

## V.

And the plaintiff further alleges that she is informed and believes that the contract and agreement so as aforesaid made between the plaintiff and the defendant, and their subsequent cohabitation as husband and wife in pursuance thereof, constitutes a valid common law marriage between the plaintiff and the defendant, and therefore she is the lawful wife of said defendant, and her children above named are lawful issue of such marriage and not bastards as claimed by said defendant as hereinbefore stated.

## VI.

In consideration whereof, and inasmuch as the plaintiff is without remedy in the premises, except in a Court of equity, she prays:

(a) That the said defendant may be required to answer this bill of complaint and the matters and things herein alleged, fully and particularly, but not on oath, his answer on oath being hereby expressly waived.

(b) That this honorable court, by its order and decree declare the said contract and agreement so made between the plaintiff and the defendant, and their subsequent cohabitation as husband and wife, constitutes a valid marriage, that the plaintiff is the lawful wife of the defendant, that her children above named are the legitimate heirs of said defendant, and that said marriage be affirmed in all particulars, as a valid and legal marriage.

(c) That the plaintiff may have such other or further relief in the premises as may be agreeable to equity and good conscience.

....................................

Plaintiff.

..................................

Attorney for Plaintiff.

Business Address ....................................

State of Michigan }
County of.........} ss.

.........................., the above named plaintiff, being duly sworn deposes and says that she has heard read the foregoing bill of complaint, by her subscribed, and knows the contents thereof, and that the same is true of her own knowledge, except as to those matters which are therein stated to be upon her information and belief, and as to those matters she believes it to be true. Affiant further, on oath, says that there is no collusion, understanding or agreement whatever between the parties hereto, or between the affiant and any other person in relation to this application for the affirmance of her marriage to the defendant.

....................................

Plaintiff.

Subscribed and sworn to before me this .......... day of .......... A. D. 19....

....................................

Notary Public.

My Commission will expire ........................

**No. 14. Chancery Summons.**

(See Text, §405)

STATE OF MICHIGAN.
The Circuit Court for ..............County.—In Chancery.

In the name of the People of the State of Michigan.

To ..................Greeting: You are hereby notified that a bill of complaint has been filed against you in the Circuit Court for the County of ........ in Chancery, by ...... as plaintiff, and that if you desire to defend the same, you are required to have your appearance filed in said cause, in accordance with the rules and practice of the Court, and the statute in such case made and provided in person or by attorney, within fifteen days after service of this summons upon you.

Hereof fail not, under penalty of having said bill taken as confessed against you.

The return day of this writ is the ...... day of ........ A. D. 19....

Witness the Honorable ........... Circuit Judge, at the ........ of .........., A. D. 19....

.................................

Clerk.

Underwriting: A personal decree is ...... sought against the defendant ............ and the bill is filed to reach interests in property, and for divorce, alimony and custody of children as prayed for in said bill.

.................................

Attorney for Plaintiff.

Business Address ..................................

### No. 15. Affidavit for Order of Publication—Non-resident Defendant.

(See Text, §407)

STATE OF MICHIGAN.
The Circuit Court for .............. County.—In Chancery.

.................................
Plaintiff.
v.
.................................
Defendant.

................ County.—ss.

.................. of the ........ of ............ being duly sworn deposes and says that he is the attorney for the plaintiff in the above entitled cause, and that he knows the defendant, .............. above named, and that said defendant is not a resident of the state of Michigan, but that he resides at ............ in the state of ..............

..................................

**Attorney for Plaintiff.**

Subscribed and sworn to before me this .......... day of ........ A. D. ........

..................................

**Notary Public.**

My Commission will expire ............

### No. 16. Affidavit for Order of Publication When Process Cannot be Served.

Affidavit for Order of Publication, where process has been issued and defendant is a resident of This State, but process cannot be served by reason of his absence from or concealment within this State, or by reason of his continued absence from his place of residence; or that it cannot be ascertained in what state or country the defendant resides.

**(See Text, §408)**

STATE OF MICHIGAN.

The Circuit Court for .............. County.—In Chancery.

..................................

Plaintiff.

v.

..................................

Defendant.

County of ............—ss.

.............., of the ........ of ........ and State of Michigan, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled cause; that the bill of complaint in said cause was filed in said Court on the ........ day of ........ A. D. 19...., and on the same day a Chancery Summons for the appearance of said defendant was duly issued out of and under the seal of said Court returnable on the ........ day of ........ A. D. 19...., and delivered to the Sheriff of said County for service on said defendant.

Deponent further says that the said defendant is a resident of this State, that he resides at the ........ of ....... in the State of Michigan, and that said chancery summons could not be served upon said defendant on or before the return day thereof for the reason that during said time the said defendant was absent from the State of Michigan (or) for the reason that during said time from the date of issuing said chancery summons until after the return day thereof the said defendant was concealed and is still concealed within the State of Michigan or elsewhere, (or) for the reason that after diligent search and inquiry it cannot be ascertained in what state or country the defendant resides.

Deponent further says that on the ........ day of ....... A. D. ........ the sheriff of said county returned said chancery summons with his certificate thereon endorsed that he was unable to find the said defendant in said State of Michigan.

..................................

Subscribed and sworn to before me this ...... day of ...... A. D. 19....

..................................

Notary Public.

My Commission will expire ..............

N. B. (If the order is applied for on the ground of the defendant being concealed, the affidavit, after stating his residence as above, should also state the facts and circumstances, and the source of information which induces a belief that the defendant is concealed, and such facts and circumstances must be such as will satisfy the Court that the defendant is concealed and keeping out of the way to avoid service of the summons. If the order is applied for on account of the continued absence of the defendant from his place of residence the affidavit should state the length of such absence and the circumstances thereof and the exertions which have been made to find him. If applied for because it cannot be ascertained in what state or country the defendant resides the affidavit should state what efforts and inquiry have been made to ascertain the fact.)

## No. 17. Order of Publication—Non-resident Defendant.

Ante, Sec. 407.

STATE OF MICHIGAN.
The Circuit Court for .......... County.—In Chancery.

..................................
Plaintiff.
v.
..................................
Defendant.

Suit pending in the Circuit Court for .......... County, In Chancery, on the ........ day of ........ A. D. 19.... At ........ in said County.

It satisfactorily appearing to this Court by affidavit on file that the defendant ........... is not a resident of the State of Michigan, but resides at ........ in the State of ........ on motion of ........... attorney for the plaintiff. IT IS ORDERED, that the said defendant .......... cause his appearance to be entered in this cause within three months from the date of this order, and in case of his appearance that he cause his answer to the plaintiff's bill of complaint to be filed, and a copy thereof to be served upon the plaintiff's attorney, within twenty days after service on him of a copy of said bill, and notice of this order, and that in default thereof that said bill be taken as confessed by said non-resident defendant.

And it is further ordered that within ~~twenty~~ days after the date hereof, the said plaintiff cause a notice of this order to be published in the ........... a newspaper printed, published and circulating in said County of ..........., and that such publication be continued once in each week for six successive weeks, or that he cause a copy of this order to be served personally on said non-resident defendant, at least twenty days before the time above prescribed for his appearance: And it is FURTHER ORDERED that the said plaintiff cause a copy of this order to be mailed to said defendant at his last known postoffice address by registered mail, and a return receipt demanded at least ........ ~~days before the~~ time herein prescribed for the appearance of the defendant.

Act 234 PA 1919

70 da

..................................
Circuit Judge.

174

..................................
Attorney for Plaintiff.

Business Address, ................

Comp Laws 1915 Sec 12

C+P Sec 517

425

## No. 18. Order of Publication—Defendant's Residence Unknown

(See Text, §408)

STATE OF MICHIGAN.
The Circuit Court for the County of .........—In Chancery.
...Lilia Rudas.....
Plaintiff.

v.

...John Rudas.....
Defendant.

Suit pending in the Circuit Court for Houghton County, In Chancery, on the ..18... day of ..July. A. D. 1917. at Houghton in said County of ..Houghton

It satisfactorily appearing to the Court by affidavit on file that a chancery summons has been duly issued out of and under the seal of said Court, for the appearance of said defendant therein, and that the same could not be served on said defendant because that after diligent search and inquiry it could not be ascertained in what state or country the said defendant resides, or the whereabouts of said defendant learned, and that said chancery summons has been returned by the sheriff of said county with his certificate thereon indorsed that after diligent search and inquiry he was unable to find the said defendant within the State of Michigan on or before the return day of said summons, on motion of ........... attorney for said plaintiff, IT IS ORDERED, that the said defendant, John Rudas cause his appearance to be entered in this cause within three months after the date of this order, and in case of his appearance that he cause his answer to the plaintiff's bill of complaint to be filed, and a copy thereof served upon the plaintiff's attorney, within twenty days after service on him of a copy of said bill and notice of this order, and that in default thereof said bill be taken as confessed by said defendant.

And on like motion, IT IS FURTHER ORDERED that within ~~twenty~~ forty days after the date hereof, the plaintiff cause a notice of this order to be published in the .......... a newspaper printed, published and circulating in said County of .........., and that such publication be continued at least once in each week, for six weeks in succession, or that he cause a copy of this order to be personally served upon said defendant, at least twenty days before the time above prescribed for his appearance.

And on like motion, IT IS FURTHER ORDERED, that the said plaintiff cause a copy of this order to be mailed to said defendant, at his last known postoffice address, by registered mail, and a return receipt demanded, at least .twenty days. days before the date herein prescribed for his appearance.

.................................

Circuit Judge.

.................................

Attorney for Plaintiff.

Business Address, ................

(N. B.—The Judicature Act of 1915 provides that "In all cases a copy of such order shall be mailed to said defendant at his last known postoffice address by registered mail, and a return receipt demanded, and proof by affidavit shall be required of such mailing, and whether or not a return receipt was received, and if one was received, it shall be attached to said affidavit." The statute is silent as to the time when such copy shall be mailed, but it ought to be done in time so that it will reach the postoffice to which it is addressed at least twenty days before the time prescribed in the order for the appearance of the defendant. C. L. '15, (12452); Cummins & Beecher's Michigan Judicature Act, §575.

## No. 19. Order of Publication—Defendant Concealed.

(See Text, §408)

STATE OF MICHIGAN.
The Circuit Court for the County of........ —In Chancery.

.................................
Plaintiff,
v.
.................................
Defendant.

Suit pending in the Circuit Court for........County, on the .......... day of ............. A. D. 19....

It satisfactorily appearing to the Court by affidavit on file that a chancery summons has been issued out of and under the seal of said Court for the appearance of said defendant therein, and that the same could not be served on or before the return day thereof because that the said defendant, being a resident of said State of Michigan, was concealed therein or elsewhere, and said chancery summons having been returned with the certificate of the sheriff of said County thereon, indorsed showing that after diligent search and inquiry the said defendant could not be found in said State of Michigan on or before the return day of said summons, on motion of................attorney for said plaintiff, IT IS ORDERED, that the said defendant ........................., cause his appearance to be entered in said Court and cause within three months after the date of this order, and that in case of his appearance he cause his answer to the plaintiff's bill of complaint to be filed, and a copy thereof served upon the attorney for the plaintiff within twenty days after service upon him of a copy of said bill, and notice of this order, and that in default thereof, the said bill be taken as confessed by said defendant.

And on like motion it is further ordered that within twenty days after the date hereof, the plaintiff cause a notice of this order to be published in the ................, a newspaper printed, published and circulated in said County of........, and that such publication be continued once in each week for six weeks in succession, or that he cause a copy of this order to be personally served upon said defendant at least twenty days before the time herein prescribed for his appearance.

And on like motion IT IS FURTHER ORDERED, that the said plaintiff cause a copy of this order to be mailed to said defendant at his last known post office address, by registered mail, and a return receipt demanded, at least ........... days before the time herein prescribed for the appearance of said defendant.

...............................

Circuit Judge.

..................................

Attorney for Plaintiff.

Business Address ..............................

**No. 20. Notice of Appearance of Defendant.**

(See Text, §410.)

STATE OF MICHIGAN.

The Circuit Court for .............County.—In Chancery.

........... ....................

Plaintiff.

v.

...............................

Defendant.

Take Notice, That the defendant in the above entitled cause hereby appears therein, and demands a copy of the plaintiff's bill of complaint.

..............................

Attorney for Defendant.

Business Address ................

Dated .................... 19....

To..............................

Attorney for Plaintiff.

### No. 21. Motion to Dismiss.

(See Text, §413.)

STATE OF MICHIGAN.

The Circuit Court for ............ County.—In Chancery.

...............................

Plaintiff.

v.

...............................

Defendant.

Now comes the above named defendant, ................, by ...................., his attorney and moves the Court for an order dismissing the bill in the above entitled cause for the following reasons:

1st. For the reason that ......................

2nd. For the reason that the plaintiff has not in and by said bill stated or set forth such a state of facts as entitles .................. to the relief therein prayed.

3d. ......................

This motion is based upon the affidavit of................ herewith filed, and upon the files and records in said Court and cause.

(Or upon the petition of the defendant hereto annexed and herewith filed).

Dated ..............................

...............................
Attorney for Defendant.

To......................Attorney for Plaintiff.

Take notice that the foregoing is a true copy of a motion to dismiss the bill of complaint in the above entitled cause and of the affidavits upon which the same is based, and that the same will be brought on for hearing before said Court on the ...........day of ..............A. D. 19...., at the Court House in the ............ of ............ at .......... o'clock in the forenoon.

Dated ..............................

...............................
Attorney for Defendant.

## No. 22. Order Pro Confesso for not Appearing.

(See Text, §414.)

STATE OF MICHIGAN.
The Circuit Court For .......... County.—In Chancery.

...............................
Plaintiff.
v.
...............................
Defendant.

On filing due proof of the personal service of the summons heretofore issued in the above entitled cause, upon the defendant .................., on or before the return day thereof, and more than fifteen days having elapsed since the time of such service, and the said defendant ........ not having appeared in said cause as shown by the records and files of this Court, and the affidavit of ........ on file in said Court and cause;

On motion of .........., attorney for the plaintiff, IT IS ORDERED, that the bill of Complaint filed in this cause be, and the same hereby is taken as confessed by said defendant, and that the proofs in said cause be taken in open Court as in an action at law.

Dated........................

...............................
Attorney for Plaintiff.

...............................
Clerk.

## No. 23. Order Pro Confesso for not Answering.

(See Text, §415.)

STATE OF MICHIGAN.
The Circuit Court for ............ County.—In Chancery.

..............................
Plaintiff.
v.
..............................
Defendant.

On filing due proof of the personal service of the summons heretofore issued in the above entitled cause, upon the defendant ........................, on or before the return day thereof, and of the appearance of the defendant, and that a copy of the bill of complaint was duly served on ........... ................, attorney for said defendant within fifteen days after notice of the appearance of said defendant, and that more than fifteen days have elapsed since the service of said copy of said bill, and that the defendant has not caused his answer to be filed and served. On motion of ............ Attorney for the plaintiff, it is ORDERED, that the bill of complaint in this cause be, and the same hereby is taken as confessed by said defendant.

And on like motion it is further ORDERED that the proofs in said cause be taken in open Court as in an action at law.

Dated ..............................

..............................
Attorney for Plaintiff.

..............................
Clerk.

## No. 24. Order Pro Confesso Defendant Brought in by Publication.

(See Text, §415.)

STATE OF MICHIGAN.
The Circuit Court For .......... County.—In Chancery.

..............................
Plaintiff.
v.
..............................
Defendant.

Suit Pending in the Circuit Court For .......... County, In Chancery on the ........ day of ........ A. D. 19....

On filing due proof of Publication of notice of the order heretofore made in said cause, requiring the defendant ...... to enter his appearance therein and answer the bill of complaint filed in this cause within three months from the date of said order, and the time limited in said order for the entering of such appearance having expired, and on filing due proof that said defendant ........ has not appeared in said cause;

On motion of ............ Attorney for the plaintiff, it is ORDERED that the said bill of complaint be, and the same hereby is taken as confessed by said defendant.

And on like motion, it is further ORDERED that the proofs in said cause be taken in open Court as in an action at law.

................................
Attorney for Plaintiff.

................................
Clerk.

### No. 25. Affidavit of Non-Appearance.

(See Text, §414.)

STATE OF MICHIGAN,
The Circuit Court For .......... County.—In Chancery.

................................
Plaintiff.
v.
................................
Defendant.

....................County, ss.

............ of ............ being duly sworn says that he is the attorney for the plaintiff in the above entitled cause, and that the bill of complaint was filed in said cause on the .......... day of .......... A. D. 19....; that on the same day a chancery summons was duly issued out of and under the seal of said Court and was personally served upon said defendant ............ on the ............ day of .......... A. D. 19...., as appears by proof of service thereof on file in said Court and cause, and that although more than fifteen days have elapsed since such service this deponent has not received any notice that an appearance for said defendant has been filed in said cause by or on behalf of the said defendant

.........., and that the said defendant has not caused his appearance to be entered in said Court and cause as appears by the files and records in said Court and cause.

..............................

Subscribed and Sworn to Before me This .......... Day of .......... A. D. 19....

..............................

Notary Public.

My Commission will expire ......................

**No. 26. Affidavit of Default for Want of Answer.**

(See Text, §415.)

STATE OF MICHIGAN.
The Circuit Court For .......... County.—In Chancery.

..............................
Plaintiff.
v.
..............................
Defendant.

County of .........., ss. ................ of ............ being duly sworn deposes and says that he is the attorney for the plaintiff in the above entitled cause, and that on the .... day of .......... A. D. ...... the defendant entered his appearance therein by ................ his attorney, and demanded a copy of the bill of complaint; that afterwards on the .......... day of .......... A. D. 19.... this deponent served a copy of said bill of complaint personally on said ............ attorney for said defendant, and that although more than fifteen days have elapsed since such service, this deponent has not received any copy of, or notice of filing of any motion to dismiss, or answer to said bill by or on behalf of the defendant ........; and that the said defendant ........ has not filed any motion to dismiss or answer to said bill as appears by the files and records of said Court and cause.

..............................

Subscribed and Sworn to Before me this ...... day of ...... A. D. 19....

..............................

Notary Public.

My Commission will expire ......................

## No. 27. Supplemental Bill.

(See Text, §424.)

STATE OF MICHIGAN.
The Circuit Court For the County of .......... In Chancery.

To the Court:—

..........Plaintiff in this suit respectfully represents unto this Honorable Court as follows:

I.

That on the ...... day of ...... A. D. 19.... he exhibited his bill of complaint in this Court against ................ the defendant thereby praying that the bonds of matrimony between said plaintiff and said defendant be dissolved and a divorce from the bonds of matrimony decreed, for the reasons as set forth in said bill that the said defendant had deserted and abandoned the plaintiff against his will and consent and that such desertion and abandonment had continued for more than two years next preceding the time of exhibiting said bill of complaint.

II.

That on the ........ day of ........ A. D. 19.... the said defendant .......... appeared in said cause by .......... her attorney and filed her answer to said bill denying said desertion charged in said bill, as by the files and records in said Court and cause will more fully appear; which said cause is still pending and undetermined in this Court.

III.

The plaintiff further shows, by way of supplement that since the filing of said bill of complaint and the defendant's answer thereto, the said defendant, further disregarding her marriage vow and obligation, did commit adultery and have illicit carnal intercourse with one .................. on the .......... day of .......... A. D. ............ at the .......... of .......... in the State of ............

IV.

Inasmuch therefore as the plaintiff is without remedy in the premises, except in a Court of Equity, he prays:—

(a) That the defendant .......... may be required to answer this bill of complaint fully and particularly, but not on oath, her answer on oath being hereby expressly waived.

(b) That this, the plaintiff's bill of complaint may be deemed and taken as and for a bill of supplement to his said original bill.

(c) That the plaintiff may have such other or further relief in the premises as shall be agreeable to equity and good conscience.

....................................
Plaintiff.

....................................
Attorney for Plaintiff.
Business Address....................

State of Michigan }
County of ........} ss.

.............., the above named plaintiff being duly sworn deposes and says that he has heard read the foregoing supplemental bill by him subscribed and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be upon his information and belief and as to those matters he believes it to be true. Affiant further on oath says that there is no collusion understanding or agreement between the parties hereto, or between this affiant and any other person, in relation to his application for a divorce, or in relation to the matters charged in this his supplental bill.

....................................
Plaintiff.

Subscribed and sworn to before me this ...... day of ...... A. D. 19....

....................................
Notary Public.

My Commission will expire .......................

## No. 28. Petition for Leave to File Supplemental Bill.

(See Text, §427.)

STATE OF MICHIGAN.
The Circuit Court For ............ County, In Chancery.

....................................
Plaintiff,
v.
....................................
Defendant.

To the Court:

The petition of ............., the above named plaintiff respectfully represents unto this Honorable Court as follows:

I.

That on the .......... day of ........ A. D. ........ he filed his bill of Complaint in this Court against the above named defendant ........... praying that the marriage between the plaintiff and the defendant be dissolved and a divorce from the bonds of matrimony decreed, for the reason that the defendant had deserted and abandoned the plaintiff against his will and consent, and that such desertion and abandonment had continued for more than two years next preceding the time of exhibiting said bill of complaint.

II.

The plaintiff further represents that after the filing of said bill of complaint, and on the ........ the ........ day of ........ A. D. 19.... the said defendant duly appeared in said cause by ........... her attorney and answered said bill, denying said charge of desertion, and that said cause is still pending and undetermined in this Court.

III.

That after the filing of said bill and the answer thereto, the said defendant ........... disregarding the solemnity of her marriage vow and obligation did commit adultery and have illicit carnal intercourse with one ........... at the ........... of ........... in the state of ...........

IV.

That by reason of the said offense of adultery having been committed after the filing of said bill and answer, the same cannot be relied on by said plaintiff as a ground of divorce in said cause unless the said plaintiff is permitted to file a supplemental bill setting forth the commission of said offense by said defendant, and your petitioner is advised that it is necessary to file a supplemental bill of complaint in this cause.

Your petitioner therefore prays that an order may be made and entered by this honorable Court permitting the plaintiff to file a supplemental bill against said defendant charging said act of adultery as hereinbefore set forth as an additional cause of divorce, and that your petitioner may have such other or further relief in the premises as shall be agreeable to equity and good conscience.

...................................

Attorney for Plaintiff.

...................................

State of Michigan }
County of ........ } ss.

............, the above named petitioner being duly sworn deposes and says that he has heard read the foregoing petition by him subscribed and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be upon his information and belief and as to those matters he believes it to be true.

...................................

Subscribed and sworn to before me this ...... day of ...... A. D. 19....

...................................

Notary Public.

My Commission will expire ...................

## No. 29. Notice of Application.

To ...........................,

Attorney for Defendant.

Take Notice, that the foregoing is a true copy of a petition filed in the above entitled cause, and that the same will be brought on for hearing before said Court on the ........ day of ........ A. D. 19.... at the Court house in the ........ of ........ in said County, at ...... o'clock in the ...... noon, and a motion thereupon made that the prayer of said petition be granted.

...................................

Attorney for Plaintiff.

Dated ...................19....

### No. 29a. Order Granting Leave to File Supplemental Bill.

(See Text, §427.)

STATE OF MICHIGAN.
The Circuit Court for .......... County.—In Chancery.

..................................
Plaintiff,
v.
..................................
Defendant.

At a session of said Court held at the Court House in the ............ of ........... in said County, on the ........ day of .................A. D. 19....;

Present Hon. .................... Circuit Judge.

On reading and filing the petition of ................., the plaintiff in the above entitled cause, praying for reasons therein stated, that an order may be made in said cause allowing said plaintiff to file a supplemental bill in said cause, on motion of ..................., attorney for said plaintiff it is ORDERED that the prayer of said petition be granted, and that said plaintiff may file such supplemental bill within ..... days after the date of this order, and not afterwards.

It is further ordered that said plaintiff cause a copy of this order and of said supplemental bill to be served upon .............., the attorney for said defendant within ........ days after the date of this order, and that said defendant cause her answer to said bill to be filed and served within fifteen days after service of a copy of this order and of said supplement bill upon her said attorney.

..................................
Attorney for Plaintiff.

..................................
Circuit Judge.

### No. 30. Answer—General Form.

(See Text, §418.)

STATE OF MICHIGAN.
The Circuit Court for ............ County.—In Chancery.

..................................
Plaintiff,
v.
..................................
Defendant.

The answer of .............., the above named defendant, to the bill of complaint of ................ the above named plaintiff.

This defendant saving and reserving all benefit of objection and exception to said bill of complaint, for answer thereto, or to so much thereof as ............ is advised it is necessary for .............. to answer, says:

FIRST, To the first paragraph: ....he admits the marriage between said parties at the time and place as set forth in said bill.

SECOND, To the second paragraph: ........ admits that during the time said parties lived and cohabited together as husband and wife, there were born as the issue of said marriage ........ children whose names and ages and places of residence are as set forth in said bill.

THIRD, To the third paragraph: He neither admits or denies the allegations therein contained, for the reason that he has no knowledge or information on those subjects, except as he is informed by said bill, and he therefore leaves said plaintiff to make such proof thereof as ........ may be advised is necessary for ........ to make.

FOURTH, To the fourth paragraph: he denies that on or about the ........... day of .............. at the City of .................. or at any other time or place he committed adultery and had illicit carnal intercourse with one ..................

(Answer specifically each and every paragraph of the bill by either admitting or denying the same or by disclaiming knowledge or information sufficient to form a belief, and conclude as follows.)

And the said defendant further says that the matters and things alleged and set forth in said bill of complaint are not sufficient in law to entitle the said plaintiff to the relief therein prayed, and ....he prays that the same may be dismissed with costs in favor of said defendant.

...................................

Defendant.

...................................

Attorney for Defendant.

(If the bill requires an answer on oath add jurat as follows.)

State of Michigan } ss.
County of ........ }

......................, the above named defendant, being duly sworn deposes and says that he has ...... read the foregoing answer by him subscribed and knows the contents thereof, and that the same is true of ........ own knowledge, except as to the matters which are therein stated to be upon ...... information and belief, and as to those matters he believes it to be true.

..................................

Subscribed and sworn to before me this .......... day of ................., A. D. 19....

..................................

Notary Public.

My Commission expires ....................

### No. 31. Answer and Cross-Bill.

(See Text, §420.)

STATE OF MICHIGAN.
The Circuit Court for .............. County.—In Chancery.

..................................
Plaintiff,
v.
..................................
Defendant.

The answer of ................, the above named defendant to the bill of complaint of .................., the above named plaintiff.

This defendant saving and reserving all benefit of objection and exception to the said bill, for answer thereto, or to such parts thereof as he is advised it is material or necessary for him to answer, says:

FIRST, To the first paragraph: ........ admits the marriage of said parties at the time and place as set forth in said bill.

SECOND, To the second paragraph: ........ admits that said parties lived and cohabited together as husband and wife from the time of said marriage until on or about the ........ day of .......... A. D. 19.... but he denies that the said plaintiff left .......... because of cruel and inhuman treatment, as set forth in said bill; ........ alleges that the said plaintiff abandoned and deserted this defendant without any reason or cause whatsoever, and entirely against the wish of this defendant, and said abandonment and desertion has continued for a period of .......... years and still continues, although this defendant has often requested said plaintiff to return and resume her marital duties as the ............ of this defendant.

THIRD, To the third paragraph: This defendant admits that during the time said parties so lived and cohabited together as husband and wife there were born as the issue of said marriage .......... children whose names and ages are as set forth in said bill.

FOURTH, To the fourth paragraph: This defendant says that he has no knowledge or information sufficient to form a belief, as to the matters and things alleged and set forth in said fourth paragraph, except as he is informed by said bill, and for want of such knowledge and information he neither admits nor denies the same, but leaves said plaintiff to make such proof thereof as ........ may be advised it is material or necessary for .......... to make.

FIFTH, To the fifth paragraph: This defendant denies that on or about the ........ day of ............ A. D. 19.... at ................ or at any other time or place he was guilty of extreme cruelty toward said plaintiff, and he denies each and every allegation of cruelty alleged in said bill; ......he denies that on the ........ day of ............ A. D. 19.... he used vile, profane or obscene language toward said plaintiff; ........ denies that ........ ever, at any time or place, during the time said parties lived together ........ struck said plaintiff or otherwise misused her; but on the contrary he avers that he always treated said plaintiff with kindness and consideration, and performed all of his marital duties, and furnished ........ with a good home, to the best of his ability.

(Either admit or deny each allegation of the bill, or state facts in justification, or disclaim knowledge or information, and conclude as follows:)

And this defendant says that the said plaintiff is not entitled to the relief prayed for in said bill and he prays that the same may be dismissed.

## SECOND DIVISION. CROSS-BILL.

### I.

This defendant, for the purpose of obtaining affirmative relief, in accordance with the rule and practice of this court, respectfully represents unto this honorable court as follows:

II.

That on or about the .......... day of .......... A. D. 18.... he was duly and legally married to said plaintiff, by .................., a minister of the gospel, duly and legally authorized to solemnize marriages, at the .............. of ..................... in the State of .............., and that said parties lived and cohabited together as husband and wife from the time of said marriage until on or about the .......... day of ............ A. D. ...... at which time the said plaintiff deserted this defendant, as is more particularly hereinafter set forth.

III.

That said defendant now is and for ............ years and upwards has been a resident of ............ in the State of Michigan, and now resides at ............ in the State of Michigan.

IV.

That during the time said parties so lived and co-habited together as husband and wife there were born to them as the issue of said marriage .......... children whose names and ages are as follows ............ of whom are now living.

(Give name and age of each child living at the time).

V.

That on or about the .......... day of .......... A. D. ........ the said plaintiff without any reason or cause whatsoever, and against the will of this defendant, wholly deserted and abandoned this defendant, and said desertion and abandonment has continued for ........ years and upwards, and still continues, although this defendant has frequently requested said plaintiff to return to said defendant, which request she has hitherto refused and still refuses.

VI.

And this defendant positively avers that the acts done and causes for divorce herein charged, for which divorce is sought were all committed without the consent, connivance privity or procurement of this defendant, and that this cross bill is not founded on or exhibited in consequence of any collusion, agreement or understanding whatever between the parties hereto, or between this defendant and any other person.

(1) In consideration whereof, and to the end, therefore, that the said plaintiff, if ............ can show why this defendant should not have the relief herein prayed, may, without oath, (Answer on oath being hereby expressly waived), and according to the best of ...... knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters and things herein stated and charged.

(2) and that the marriage between this defendant and the said plaintiff may be dissolved, and a divorce from the bonds of matrimony decreed, according to the statute in such case made and provided.

(3) And that this defendant may have such other relief, and such further relief in the premises, as to this Honorable Court may seem proper and as shall be agreeable to equity and good conscience.

................................

State of Michigan }
County of ........ } ss.

On this ........ day of ........ A. D. 19.... before me a Notary Public, in and for said County and state personally came the above named defendant .......... who being duly sworn by me says, that he has heard read the foregoing answer and cross bill by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be upon ........ information and belief, and as to those matters .... believes it to be true; and further that there is no collusion, understanding or agreement whatever, between the parties herein named in regard to this application for a divorce.

................................

Defendant.

Subscribed and sworn to before me this .......... day of .............. A. D. 19....

................................

Notary Public.

My Commission expires ......................

## No. 32. Petition for Reference to a Commissioner to Take Proofs.

(See Text, §432.)

STATE OF MICHIGAN.
The Circuit Court for the County of .........., In Chancery.

...............................
Plaintiff,
v.
...............................
Defendant.

To the Court:

The petition of .............., the above named plaintiff, respectfully represents unto this honorable court as follows:

I.

That on, to-wit; the ........... day of .............A. D. 19.... a decree was entered in the above entitled court and cause, dissolving the marriage between the said parties, for reasons and causes set forth in said decree, as in and by said decree, now on file in said court, and to which reference is hereby made, will more fully appear.

II.

That in and by said decree, the question of the amount of alimony to be allowed to your petitioner was reserved by said court for further directions, after proof of the extent and value of the property of the said defendant, and of the necessities of your petitioner, should be taken.

III.

That it will be very inconvenient and expensive to procure the attendance of all of the witnesses at the same time in open court, to give their testimony, and it will be much more convenient and less expense to take their testimony before a circuit court commissioner from time to time, and within a reasonable time, to suit the convenience of said witnesses and commissioner, and have the same duly reported to this court.

IV.

Your petitioner therefore prays that an order may be entered in said court and cause referring the same to .......... one of the circuit court commissioners in and for said county, directing him to take the testimony of all of the witnesses produced by said parties or either of them, as to the extent and value of the property of said defendant, and the necessities of said plaintiff, and to report said testimony together with his opinion thereon, to said court with all convenient speed; and that your petitioner may have such other and further relief in the premises as to this honorable court may seem proper, and agreeable to equity and good conscience.

..................................

Plaintiff.

..................................

Attorney for Plaintiff.

State of Michigan }
County of ........ } ss.

On this .......... day of ........ A. D. 19...., before me, a Notary Public in and for said county, personally came .... .............. the above named petitioner, who being by me duly sworn says, that she has heard read the foregoing petition by her subscribed and knows the contents thereof, and that the same is true of her own knowledge, except as to those matters which are therein stated to be on her information and belief, and as to those matters she believes it to be true.

..................................

Subscribed and sworn to before me this ............ day of .......... A. D. 19....

..................................

Notary Public.

My Commission Expires ....................

To ................, Attorney for Defendant:

Take Notice, that the foregoing is a true copy of a petition this day filed in the above entitled court and cause, and that the same will be brought on for hearing before said court, at the court house in the city of ........ in said county, on the ............ day of ............ A. D. 19.... at nine o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, and a motion thereupon made that the prayer of said petitioner be granted.

Dated ..................

..................................

Attorney for Plaintiff.

## No. 33. Order of Reference to Take Proofs.

(See Text, §432.)

STATE OF MICHIGAN.

The Circuit Court for ............. County.—In Chancery.

.................................

Plaintiff,

v.

.................................

Defendant.

At a session of said court, held at the court house in the city of ............ in said county, on the ............ day of ............ A. D. ...., Present, Hon. .................... Circuit Judge.

On reading and filing the petition of .................., the above named plaintiff, praying that an order be entered in said cause, referring the same to a circuit court commissioner, to take proof of the extent and value of the property of the said defendant, and of the necessities of the above named plaintiff, to aid the further directions of the court as to the amount of alimony to be allowed to the said plaintiff;

On motion of ................, Attorney for the plaintiff, after hearing .................., Attorney for the defendant, in opposition thereto, it is ORDERED that the matter be referred to .............., one of the circuit court commissioners in and for said county, and that said commissioner proceed to take the testimony of all of the witnesses produced by said parties or either of them, as to the extent and value of the estate of said defendant owned by him at the time of the commencement of this suit and at the present time, and also of the circumstances and necessities of the plaintiff.

And it is further ORDERED, that said commissioner cause the testimony of said witnesses to be reduced to writing, and subscribed and sworn to by them, and that he report the same to this court, together with his opinion thereof, within ...... days from the date of this order.

.................................

Circuit Judge.

## No. 34. Notice of Taking Proofs Before Commissioner.

(See Text, §433.)

STATE OF MICHIGAN.
The Circuit Court for ............. County.—In Chancery.

.................................
Plaintiff,
v.
.................................
Defendant.

To ...................., Attorney for Defendant:

TAKE NOTICE, that in pursuance of an order of said court, made and entered in the above entitled cause on the ........... day of .......... A. D. 19...., of which the annexed is a true copy, the testimony of the witnesses for said parties will be taken before ............... Esq., one of the circuit court commissioners in and for said county on the ................ day of ................ A. D. 19.... at his office in the city of ............. in said county, beginning at nine o'clock in the forenoon of said date and continued from time to time to suit the convenience of said commissioner and said parties and their witnesses.

Dated ................

.................................

Attorney for Plaintiff.

## No. 35. Order Granting Motion to Dismiss Bill.

(See Text, §413.)

STATE OF MICHIGAN.
The Circuit Court for ............. County.—In Chancery.

.................................
Plaintiff,
v.
.................................
Defendant.

At a session of said court, held at the court house in the city of .............. in said county, on the ............ day of ............ A. D. 19...., Present, Hon. ................ Circuit Judge.

A motion having been heretofore made and filed by and on behalf of the plaintiff in the above entitled cause, for an order dismissing the bill of complaint therein, for reasons stated in said motion, after hearing ................, Attorney for said defendant in support of said motion, and ..............., Attorney for said plaintiff in opposition thereto, and it appearing to the court that said bill of complaint is not sufficient in law to entitle the said plaintiff to the relief therein and thereby prayed;

On motion of ................, Attorney for said defendant, it is ORDERED, that said bill of complaint be, and the same is hereby dismissed.

And on like motion it is further ordered that the said defendant recover ........ costs to be taxed, including an attorney fee of .......... dollars, and that .......... have execution therefor.

................................

Circuit Judge.

## No. 36. Report of Circuit Court Commissioner as to Alimony.

(See Text, §433.)

STATE OF MICHIGAN.
The Circuit Court for .............. County.—In Chancery.

................................
Plaintiff,
v.
................................
Defendant.

To the Circuit Court for the County of ........, In Chancery.

In pursuance of an order of this court, made in this cause on the ............ day of .......... A. D. 19.... whereby it was referred to me, the undersigned, a circuit court commissioner in and for said county, to take the proofs and testimony of the witnesses for said parties, or either of them, as to the extent and value of the estate and property owned by said defendant at the time of the commencement of this suit and at the present time, and also as to the circumstances and necessities of the plaintiff, to aid the further directions of said court as to the amount of alimony to be awarded to the plaintiff, I, the said circuit court commissioner do hereby respectfully report:

That having given due notice to the respective parties of the time and place of the hearing thereof, and having been attended by the Attorneys for each of the parties, and having caused to come before me all of such witnesses as the respective parties desired or made known to me, I did on the .......... day of ............ A. D. 19.... at my office in the city of .................. in said county, proceed to take the proofs of the respective parties, and the several witnesses attending having been severally duly sworn and examined before me touching the matters aforesaid, I caused their testimony to be reduced to writing, and caused the same to be subscribed by each of said witnesses, and have attached the same hereto as and for a part of this my report.

I further report that I find from the evidence that the defendant has and is the owner of real estate of the value of ............. dollars or thereabout, the yearly income from which is ................. dollars or thereabout, and that the personal estate consists of (state what) and the value thereof is about .............. dollars, and the yearly income therefrom is ................ dollars. That ............. children of the issue of the marriage between the parties, namely: (give name, age and sex of each child) live with and are entirely supported by the plaintiff. That the plaintiff has no means of support, other than her personal labor; that she is in poor health and unable to work a considerable portion of the time.

I further report that the sum of ............ dollars per year paid quarterly in advance would be a suitable allowance for support and alimony, of the said plaintiff with said minor children, and that it ought to be payable from the ........... day of ............. A. D. 19...., and that such alimony and allowance be made subject to be increased or decreased in the future as circumstances may be shown to require.

And that my fees amount to .............. dollars, all of which is respectfully submitted.

Dated ...................

..................................
Circuit Court Commissioner.

## No. 37. Order Confirming Report of Commissioner.

(See Text, §433.)

STATE OF MICHIGAN.
The Circuit Court for .............. County.—In Chancery.

................................
Plaintiff,
v.
................................ (caption)
Defendant.

On reading the report of ............ Esq., a circuit court commissioner of said county of ............ wherein he reports that in his opinion the sum of .............. dollars per year, payable quarterly in advance would be a suitable allowance for support and alimony of said plaintiff with her said minor children and that the same ought to be made payable from the ............ day of ............ A. D. 19...., and the court having duly considered said report and having heard counsel for the respective parties in relation thereto, and being fully advised thereon:

It is ORDERED, ADJUDGED AND DECREED, by the court now here that said report be, and the same hereby is, in all things approved and confirmed.

And it is further ORDERED, ADJUDGED AND DECREED, that the said defendant do pay to the said plaintiff the sum of ....... dollars per year, payable quarterly in advance, beginning on the ........ day of ........ A. D. 19... for her support and for the support of her said .......... minor children, until the further order of this court, and that said amount so to be paid by said defendant to said plaintiff be a lien upon the real estate of said defendant as to all amounts from time to time due and unpaid.

And it is further ORDERED, ADJUDGED AND DECREED, that the said plaintiff do recover against the said defendant her costs to be taxed, including an attorney fee of ............ dollars and that she have execution therefor.

................................
Circuit Judge.

## No. 38. Petition for Temporary Alimony and Expenses by Plaintiff.

(See Text, §437.)

STATE OF MICHIGAN.
The Circuit Court for .............. County.—In Chancery.

.................................
Plaintiff,
v.
.................................
Defendant.

To the Circuit Court for ............ County, In Chancery.

The petition of .............., the above named plaintiff, respectfully shows unto this honorable court as follows:

I.

That she is the wife of the above named defendant and that she has recently, and on the ............ day of ............ 19...., filed her bill of complaint in this cause against the said defendant to obtain a decree of divorce dissolving the marriage between herself and the said defendant, because of (state ground on which divorce is asked), as in and by your petitioner's said bill now on file in this court, more particularly set forth, and to which reference is made, will more fully and at large appear.

II.

That she is wholly destitute of the means of supporting herself, and .......... young children, the offspring of said marriage during the pendency of this suit, and is destitute of the means of prosecuting the same and defraying the costs and expenses attending the same, and that she has no means with which to employ and pay an attorney for his services in connection with the prosecution thereof.

III.

That the said defendant is the owner of a considerable amount of property (describe it), from which he derives an income of ........ dollars per annum, as your petitioner is informed and believes and therefore charges the fact to be on information and belief, that the said defendant is abundantly able to furnish your petitioner with sufficient means for the support of herself and said children during the pendency of this suit, and to enable her to employ counsel to prosecute the same, and to pay the necessary costs and expenses thereof.

Your petitioner therefore prays that the said defendant may be required by the order of this court to pay to her a reasonable sum per week for the support of herself and children during the pendency of this suit, and also such reasonable sum or sums of money as may be necessary to enable her to prosecute her suit in this court and cause, and to pay attorney's fees, officers' fees, witnesses' fees and other expenses thereof, and that she may have such further or other relief, as to this court shall seem proper, and agreeable to equity and good conscience.

..............................

Plaintiff.

..............................

Attorney for plaintiff.

State of Michigan
County of ........ } ss.

On this ............ day of ............ A. D. 19.... before me, a Notary Public, in and for said county, personally came ..............., the above named petitioner, who being by me duly sworn says that she has .......... read the foregoing petition by her subscribed and knows the contents thereof, and that the same is true of her own knowledge except as to the matters which are therein stated to be upon her information and belief and as to those matters she believes it to be true.

..............................

Plaintiff.

Subscribed and sworn to before me this ............ day of ............ A .D. 19....

..............................

Notary Public.

My Commission Expires ..................

To ..............., Attorney for Defendant:

TAKE NOTICE, that the foregoing is a true copy of a petition this day filed in the above entitled court and cause, and that the same will be brought on for hearing before said court on the ............ day of ............ A. D. 19.... at the court house in the city of .......... in said county, at nine o'clock in the forenoon of that date, or as soon thereafter as counsel can be heard, and a motion thereupon made that the prayer of said petition be granted.

Dated ............ 19....

....................................

Attorney for Plaintiff.

## No. 39. Petition for Alimony and Expenses, by Defendant.

(See Text, §437.)

STATE OF MICHIGAN.

The Circuit Court for ................ County. In Chancery.

.................................

Plaintiff,

v.

.................................

Defendant.

The Circuit Court for .............. County.—In Chancery.

I.

The petition of .............., the above named defendant, respectfully shows unto the court that she is the wife of the above named plaintiff, ................, and that said plaintiff has lately filed his bill of complaint in this court against your petitioner to obtain a decree of divorce dissolving the marriage between him and your petitioner, charging your petitioner with having been guilty of (*state ground of divorce as charged in the bill*), that your petitioner has filed her answer to the said bill of complaint denying such charges, as by reference to said bill and answer now on file in said cause, to which reference is made will more fully appear.

II.

Your petitioner further shows that she is wholly destitute of the means of supporting herself during the pendency of this suit and is destitute of the means of maintaining her defense and of defraying the cost of expenses attending the same.

III.

And that the said plaintiff is the owner of a considerable amount of property and is the owner of (*set forth the property so far as known and its value*), and that he is also in receipt of a considerable income and that the annual (*or monthly*) income of the said plaintiff is at least $........ your petitioner therefore prays that the said plaintiff may be required by an order of this court to pay to her a reasonable sum per month for her support and maintenance during the pendency of this suit and also such sum and sums of money as may be necessary to enable her to carry on her defense, to pay attorney fees, and to defray the other necessary costs and expenses thereof, and that she may have such further or other relief as to this court shall seem meet.

..............................

..............................

Attorney for Petitioner.

State of Michigan } ss.
County of ........ }

On this ............ day of ............, A. D. 19.... before me, the subscriber, a Notary Public, in and for said county and state personally came ...................., the above named petitioner, who being by me duly sworn says that she has heard read the foregoing petition by her subscribed and knows the contents thereof and that the same is true of her own knowledge except as to such matters as are therein stated to be upon her information and belief and as to those matters she believes it to be true.

..............................

Subscribed and sworn to before me this ............ day of ............ A. D. 19....

..............................

Notary Public.

My Commission expires ......................

## No. 40. Order Allowing Temporary Alimony and Expenses to Plaintiff.

(See Text, §438.)

STATE OF MICHIGAN.
The Circuit Court for .............. County.—In Chancery.

...................................
Plaintiff,
v.
...................................
Defendant.

At a session of said court held at the court house in the city of ........... in said county on the ............. day of ............., A. D. 19....

Present Honorable ..................., Circuit Judge.

In this cause the petition of the above named plaintiff for alimony during the pendency of this cause and a reasonable sum to enable her to defray the expenses of prosecuting her said suit came on to be heard, and the court having heard and considered the said petition and the testimony presented by the parties respectively and the arguments of counsel for each party: it is ordered by the court now here that the defendant pay to the plaintiff or to her attorney the sum of $.......... within .......... days from the date hereof and that he pay to the plaintiff the further sum of $.......... per month on or before the ............ day of each and every month commencing on the .......... day of ............., A. D. 19...., for her support during the pendency of this suit.

...................................
Circuit Judge.

...................................
Clerk.

## No. 41. Order for Alimony and Expenses, to Defendant.

(See Text, §438.)

STATE OF MICHIGAN.
The Circuit Court for .............. County.—In Chancery.

...................................
Plaintiff,
v.
................................... (Caption)
Defendant.

This cause came on to be heard upon the petition of the defendant for alimony during the pendency of this suit and for an allowance to enable her to defend the same. And the court having heard the petition of the said defendant duly verified and the affidavits and other testimony in support thereof and the counter-affidavits on the part of the said plaintiff, and the arguments of counsel, and upon due consideration thereof: it is ordered and adjudged that the said plaintiff do within ........ days from the date of this order pay to the attorney for the defendant $.......... as an attorney's fee, and that he also pay to the said defendant or her attorney the further sum of $.......... per month for each and every month in advance during the pendency of this suit commencing on the ........... day of ............, A. D. 19.... and that he pay to the defendant or her attorney the fees of the witnesses for the said defendant and all fees of officers and court expenses as they accrue on demand.

..............................

Circuit Judge.

Countersigned

..............................

Clerk.

## No. 42. Order Denying Temporary Alimony.

(See Text, §438.)

STATE OF MICHIGAN.
The Circuit Court for ............. County.—In Chancery.

..............................
Plaintiff.
v.
.............................. (Caption)
Defendant.

This cause came on to be heard upon the petition of the ................ for alimony during the pendency of this suit and for an allowance to enable her to ............ the same. And the court having heard the petition of the said .......... duly verified and the affidavits and other testimony in support thereof, and the counter-affidavits on the part of the said ................ and the arguments of counsel, and upon due consideration thereof: it is ordered and adjudged and the court now here does hereby order and adjudge, that the prayer of said petition be and the same is hereby denied.

..................................
Circuit Judge.

..................................
Clerk.

### No. 43. Demand for Payment of Temporary Alimony.

(See Text, §443.)

STATE OF MICHIGAN.
The Circuit Court for .............. County.—In Chancery.

..................................
Plaintiff,
v.
..................................
Defendant.

To .............., the above named plaintiff (*or defendant*).

Sir:—

You will please pay to me or (*to the bearer hereof*) forthwith the sum of $......, the same being the amount now due and unpaid upon an order for alimony and expenses made in the above entitled cause by the said Court on the ........ day of ..........., A. D. 19.... *(if sent by messenger insert)*, and you are hereby notified that the bearer hereof has full power and authority from me to demand and receive of and from you the said sum of money, I being attorney for the above named ...................... in the above entitled cause.

Dated this ........... day of .............., A. D. 19....

..................................
Attorney for.

### No. 44. Affidavit to Obtain an Attachment for Non-Payment of Temporary Alimony.

(See Text, §443.)

STATE OF MICHIGAN.
The Circuit Court for ............. County.—In Chancery.

..................................
Plaintiff.
v.
..................................
Defendant.

County of ............, ss.

......................, the attorney for the plaintiff in the above entitled cause being duly sworn says that heretofore and on the ......... day of ..........., A. D. 19...., an order was made in this cause requiring the above named defendant, ......................., to pay to the attorney for the said plaintiff the sum of $......, as an attorney fee and $...... to defray officers fees and court expenses within ........ days from the date of this order, and that he, the said defendant, should also pay to the said plaintiff or her attorney the further sum of $...... per month for each and every month in advance during the pendency of this suit, commencing on the ......... day of ............, A. D. 19...., and that he, the said defendant, should also pay to the plaintiff or to her attorney the fees for the witnesses for the said plaintiff and all fees of officers and court expenses as they should accrue and on demand, as in and by the said order now remaining of record in this court, and to which reference is prayed, fully appears.

And that afterwards and on the ........ day of .........., A. D. 19...., a certified copy of the said order was personally served upon the said defendant, ......................., as fully appears by the affidavits of ......................., hereto annexed and that more than ........... days have elapsed since the date of the said order and since the service of the said certified copy thereof on the said defendant, and that the said sum of $...... so ordered to be paid as an attorney fee as well as the sum of $...... for officers' fees and court expenses is now past due, and that the said sum of $...... per month so ordered to be paid on the .......... day of each month during the pendency of this suit is now due and payable for each of the months of ............... and ..............., and that this deponent has as attorney for the plaintiff, since said several sums became due, on the .......... day of ............, A. D. 19...., called upon the said defendant and demanded of him that he should pay the same, and on the .............. day of .............. A. D. 19.... he served *(or caused to be served)* upon the said defendant a demand in writing for the same a copy of which demand in writing is hereto annexed.

And this deponent further says that the said defendant has not paid the said several sums or any part thereof and has hitherto refused and still does refuse to pay the same or any part thereof.

..............................

Subscribed and sworn to before me this .......... day of .............. A. D. 19....

..............................

Notary Public.

My Commission expires .................

(Annex affidavit of service of certified copy of order, also affidavit of service of demand if written demand was made).

### No. 45. Order to Show Cause Why Attachment Should not Issue.

(See Text, §443.)

STATE OF MICHIGAN.
The Circuit Court for ............. County.—In Chancery.

..............................
Plaintiff.
v.
..............................
Defendant.

At a session of said court held at the court house in the city of .......... in said county on the ....... day of .......... A. D. 19.....

Present Honorable ...................., Circuit Judge.

On reading and filing due proof of service of a certified copy of the order made in this cause on the ......... day of ........ A. D. 19.. on the above named defendant, ......... personally ................., and on reading and filing due proof of a personal demand of payment of the several sums of money due and unpaid upon the said order at the time of the service thereof upon the said defendant, and that more than .......... days have elapsed since such service and demand and that the said defendant has neglected to pay the same or cause the same to be paid or any part thereof: on motion of ......................, attorney for the said plaintiff it is ordered that the said defendant, .................. appear before this court on the ........ day of .........., A. D. 19..... at the opening of the court on that day at nine o'clock in the forenoon or as soon thereafter as the same can be heard, and show cause why an attachment should not issue against him and he be punished and committed to the common jail of said county of ................, for his alleged contempt of this court in his alleged neglect in not paying the said several sums of money mentioned in the said order of this court made on the ........... day of ............, A. D. 19...., and his failure to comply with the terms and requirements of said order. And it is further ordered that a certified copy of this order together with copies of the affidavits on file whereon this order is founded be served upon the said defendant, ...................., on or before the ......... day of ................, A. D. 19....

..............................

Circuit Judge.

Examined, countersigned and
entered by me,

..............................

Clerk.

## No. 46. Order for Attachment and Commitment.

(See Text, §443.)

STATE OF MICHIGAN.
The Circuit Court for ............. County.—In Chancery.

..............................
Plaintiff.
v.
..............................
Defendant.

At a session of said court held at the courthouse in the city of ................ in said county on the ........... day of ................, A. D. 19....

Present Honorable ...................., Circuit Judge.

In this cause on reading and filing due proof of the personal service upon the above named defendant, ................, of a certified copy of the order of this court heretofore and on the ........... day of ............, A. D. 19...., made in this cause, requiring him, the said defendant, ........... ..............., to appear before this court on the ........ day of ................, A. D. 19...., and show cause why an attachment should not issue against him as for a contempt, for his neglect and refusal to comply with and obey the order of this court theretofore, and on the ...... day of..........,

A. D. 19...., made in this cause requiring him to pay the attorney for the plaintiff the sum of $...... for attorney fees, officers fees and court expenses within .......... days from the date of said order, and also pay to the plaintiff or her attorney the further sum of $...... per month in advance on the ......... day of each month for her support and maintenance during the pendency of this suit, together with the copies of all the affidavits whereon the said order was founded, and on reading the affidavits on file in support of the said order and the affidavits of and on behalf of the said defendant in reply thereto, and it appearing to the court now here, that there is now due and unpaid on the said order made on the said ........... day of .............., A. D. 19...., the sum of $...... for attorney fees, officers' fees and court expenses, and the further sum of $...... for the support and maintenance of the said plaintiff, and that a certified copy of the said last mentioned order was duly served upon the said defendant and that more than ........... days have elapsed since the date of said order and since such service, and that a personal demand has been made of the said defendant that he should pay the same and that the said defendant has not paid the same nor any part thereof, and that no sufficient reason or cause for such non-payment has been shown.

On motion of ........................., attorney for the plaintiff, and after hearing ........................., attorney for the defendant, it is ordered and adjudged that the said defendant, ........................, is guilty of the misconduct and contempt aforesaid, and that a precept of attachment be issued out of and under the seal of this court, directed to the sheriff of the county of ............ committing him to the common jail of the said county of ..........., and detain him in custody in the said jail until he shall pay the said several sums so ordered to be paid, and also the costs of the proceedings to compel such payment, hereby taxed at the sum of $......., together with the fees of the said sheriff in the execution of such precept.

.................................

Circuit Judge.

Countersigned and entered

..................................

Clerk.

## No. 47. Injunction to Restrain Sale or Encumbrance of Property.

(See Text, §441.)

STATE OF MICHIGAN.
The Circuit Court for the County of ........—In Chancery.

..............................
Plaintiff,
v.
..............................
Defendant.

To ...................... and to ......................, counsellors, attorneys, solicitors, agents and each and every one of them.

GREETING:

WHEREAS, it has been represented to us in the Circuit Court for the County of ..............., In Chancery, on the part of ......................, plaintiff, that ........... ............. has lately exhibited ......................... bill of complaint against you, the said ...................., as defendant, to be relieved touching the matters therein complained of; in which bill it is stated amongst other things that you are combining and confederating with others to injure the said plaintiff touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience; we therefore, in consideration thereof and of the particular matters in the said bill set forth, do strictly command you, the said .................., and the persons before mentioned and each and every one of you under the penalty of $10,000 to be levied on your lands, goods and chattels to our use that you do absolutely desist and refrain from selling, assigning, encumbering or otherwise disposing of any of your real or personal property until the further order of this court.

Witness the Honorable ........................., Circuit Judge and the seal of said court at ...................., this ........ day of ................., A. D. 19....

..............................
Attorney for Plaintiff.

..............................
Clerk.

State of Michigan, } ss.
County of......... }

I hereby certify and return that on the ............ day of ..............., A. D. 19...., at ....................... I served the within writ of injunction on ....................., the defendant named therein, personally by then and there showing to the said ....................... the said injunction with the seal of the court impressed thereon and delivering to ....................... a true copy, thereof.

..............................

Sheriff of said County.

## No. 48. Injunction to Restrain Threatened Injury.

(See Text, §442.)

STATE OF MICHIGAN.
The Circuit Court for the County of .........—In Chancery.

.................................
Plaintiff,
v.
.................................
Defendant.

To ....................... and to ......................, counsellors, attorneys, solicitors, agents and each and every one of them.

GREETING:

WHEREAS, it has been represented to us in the Circuit Court for the County of ............., In Chancery, on the part of ......................., plaintiff, that ........................... has lately exhibited ....................... bill of complaint against you, the said ......................, as defendant, to be relieved touching the matters therein complained of; in which bill it is stated amongst other things that you are combining and confederating with others to injure the said plaintiff touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience; we, therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command you, the said ...................... and the persons before mentioned and each and every one of you under the penalty of $10,000 to be levied on your lands, goods and chattels to our use that you do absolutely desist and refrain from in any manner interfering with the said ........ .................. or injuring or otherwise annoying her and from visiting her or attempting to converse with her and from in any manner injuring or interfering with any of the property in her possession until the further order of this court.

Witness the Honorable ........................, Circuit Judge, and the seal of said court at .................., this .........day of ................, A. D. 19....

................................

Attorney for Plaintiff.

................................

Clerk.

State of Michigan, } ss.
County of ........ }

I hereby certify and return that on the ......... day of ................., A. D. 19....., at ......................., I served the within writ of injunction on .................. .................., the defendant named therein, personally by then and there showing to the said ..................... the said injunction with the seal of the court impressed thereon, and delivering to ........................ a true copy, thereof.

................................

Sheriff of said county.

### No. 49. Decree of Divorce Reserving Question of Alimony.

(See Text, §446.)

STATE OF MICHIGAN.
The Circuit Court for the County of ........—In Chancery.

................................

Plaintiff,

v.

................................

Defendant.

At a session of said court held at the courthouse in the city of ..Flint...... in said county on the .......... day of ...June..... A. D. 19.47.

Present Honorable ..Frank A. Bell.........., Circuit Judge.

This cause having been brought on to be heard upon the pleadings and proofs, the proofs having been taken in open court, on reading the bill of complaint and answer of the defendant and hearing the proofs, taken as aforesaid from which it satisfactorily appears to this court that the material facts charged in said bill of complaint are true and that the defendant, ......................., has been guilty of the several acts of ....[illegible]......... therein charged:

On motion of ..[illegible]...., attorney for said plaintiff, and after hearing ......................., attorney for said defendant, in opposition thereto, it is ordered, adjudged and decreed and this court by virtue of the authority therein vested and in pursuance of the statute in such case made and provided doth order, adjudge and decree that the marriage between the said plaintiff, ..[illegible]......, and the said defendant, ..[illegible]........., be dissolved and the same is hereby dissolved accordingly. And the said parties are, and each of them, is free from the obligation, thereof.

And on like motion it is further ordered that the said plaintiff have the custody, care and control of ........................................., the minor children of said marriage, until they arrive at the age of ........... years respectively or until the further order of this court.

It is further ordered, adjudged and decreed that the question as to the alimony, and the amount thereof, to be allowed to said ......................., be and the same is hereby reserved for further directions after the taking of testimony for the determination, thereof.

..............................
Circuit Judge.

Examined, countersigned and
entered by me,

..............................
Clerk.

[illegible]

## No. 50. Decree of Divorce and for Alimony.

(See Text, §446.)

STATE OF MICHIGAN.
The Circuit Court for the County of .........—In Chancery.

..............................
Plaintiff,
v.
..............................
Defendant.

At a session of said court held at the courthouse in the city of ........................ in said county on the .......... day of ...................., A. D. 19....

Present Honorable ......................, Circuit Judge.

This cause came on to be heard upon the bill of complaint therein, the answer of the defendant thereto and upon proofs taken in open court and said proofs having been duly considered from which it satisfactorily appears to this court that the material facts charged in the said bill of complaint are true and that the defendant, [illegible] ..............., has been guilty of the several acts of [illegible] .................. therein charged.

On motion of [illegible] ......................., counsel for said plaintiff it is ordered, adjudged and decreed and this court by virtue of the authority therein vested, and in pursuance of the statute in such case made and provided, doth order, adjudge and decree that the marriage between the said plaintiff, ..........................., and the said defendant, ...... ......................, be dissolved and the same is hereby dissolved accordingly. And the said parties are and each of them is free from the obligation thereof.

It is further ordered, adjudged and decreed that the said defendant pay to the said plaintiff the sum of $.......... to be paid as follows: $.......... upon the ............ day of ............, A. D. 19.... and the further sum of $......... on the first day of each and every month during the life time of the said plaintiff or until the further order of this court.

And it is further ordered, adjudged and decreed that this decree be and remain a lien on the real estate of the defendant until he shall have given security for the faithful performance thereof to the satisfaction of this court or of the said plaintiff, and that the defendant pay to the plaintiff or her solicitor the costs of this suit to be taxed including an attorney fee of $.......... and that in case of default being made in the payment of said installments of money as the same shall become due or of the costs herein, that execution issue for the same and that the plaintiff have leave to cause this decree or a certified copy thereof to be recorded in the office of the Register of Deeds of any county in this state wherein the real estate of the defendant or any part thereof is situate as a lien on such property as aforesaid and that either party may be at liberty to apply to this court for further directions in regard to alimony as occasion may require.

.................................

Circuit Judge.

Examined, countersigned and
entered by me.

..................................

Clerk.

### No. 51. Decree for Permanent Alimony After Divorce.

STATE OF MICHIGAN.
The Circuit Court for ............. County.—In Chancery.

...............................

Plaintiff,

v.

...............................

Defendant.

At a session of said court held at the court house in the city of ............ in said county on the ............ day of ............, A. D. 19....

Present Honorable ................, Circuit Judge.

This cause came on again to be heard as to the allowance of alimony to be paid by defendant to the plaintiff upon the pleadings and proofs taken therein and the court having heretofore rendered a decree in this cause dissolving the marriage between the plaintiff and the defendant and having reserved the consideration of the question of alimony for further directions and counsel for the respective parties having been heard thereon and the court being fully advised in the premises: Thereupon in consideration thereof it is ordered, adjudged and decreed and the court doth hereby order, adjudge and decree that the said defendant pay to the plaintiff the sum of $....... during each and every year commencing on the ........... days of ............, and ............, and ..........., and ..........., of each year until the further order of this court; and that the said defendant do pay the costs of this suit including an attorney fee of $......... to be taxed by the Clerk of this court to the plaintiff or her attorney within ......... days from the date of this decree, and that in default of the payment of any of said sums or of any part thereof in the manner and at the times here provided that execution issue therefor.

And it is further ordered, adjudged and decreed that this decree shall be and remain a lien upon all the lands and tenements of the said defendant until the defendant shall execute a good and sufficient mortgage upon his real estate or upon so much thereof as shall be sufficient to secure the prompt payment of the several sums herein ordered to be paid, and such mortgage shall be approved by or under the direction of this court, or such other security as shall be approved by this court.

And it is further ordered, adjudged and decreed that the said plaintiff have leave to cause this decree or a certified copy thereof to be recorded in the office of the Register of Deeds of any county in this state wherein the real estate of the said defendant or any part thereof is situate as a lien on such property as aforesaid and that either party may be at liberty to apply to this court for further directions, as occasion may require.

..................................
Circuit Judge.

Examined, countersigned and
entered by me,

..................................
Clerk.

### No. 52. Decree of Divorce from Bed and Board and for Alimony.

(See Text, §446.)

STATE OF MICHIGAN.
The Circuit Court for the County of .........—In Chancery.

..................................
Plaintiff,
v.
..................................
Defendant.

At a session of said court held at the courthouse in the city of ......................, in said county on the ........... day of ......................, A. D. 19....

Present Honorable ......................, Circuit Judge.

This cause having come on to be heard upon the pleadings of the respective parties on file, and the proofs taken therein in open court, and having been argued by the counsel for the parties respectively, and the court being fully advised in the premises, and it appearing to the court that the material allegations in the bill of complaint contained are true and that the said defendant is guilty of the several acts of extreme cruelty and misconduct therein charged, and that the equities of the case are with the plaintiff.

Therefore, upon due consideration thereof, it is ordered, adjudged and decreed by the court now here that the said parties, plaintiff and defendant, be and they hereby are divorced from bed and board forever *(or for a limited time)*, but not otherwise from the bonds of matrimony and that the marriage between the said parties be and remain otherwise, in full force, and that the said plaintiff is entitled to a separate maintenance from the said defendant and that she be allowed, and that the said defendant do pay to her, the said plaintiff, the sum of \$.... per year, commencing from the time of the filing of the said plaintiff's bill of complaint in this cause, that is to say, from the ............ day of ................., A. D. 19...., and that the same be paid in monthly installments of \$...... each, payable, in advance on the ........... day of each and every month thereafter until the further order of this court.

And it is further ordered, adjudged and decreed that this decree be and remain a lien on the real estate of the defendant until he shall have given security for the faithful performance thereof, to the satisfaction of this court, or of the said plaintiff, and that the defendant pay to the plaintiff or her attorney the costs of this suit to be taxed, including an attorney fee of \$......, and that in case of default being made in the payment of the said installments of money as the same shall become due, or of the costs herein, that execution issue for the same; and that the plaintiff have leave to cause this decree or a certified copy thereof to be recorded in the office of the Register of Deeds of any county in this state wherein the real estate of the defendant is situate, as a lien on such property as aforesaid, and that either party may be at liberty to apply to this court for further directions in relation thereto, as occasion may require.

..............................

Circuit Judge.

Examined, countersigned and
entered by me.

..............................

Clerk.

## No. 53. Decree Annulling Marriage.

(See Text, §446.)

STATE OF MICHIGAN.
The Circuit Court for the County of ......... —In Chancery.

..................................
Plaintiff,
v.
..................................
Defendant.

At a session of said court held at the courthouse in the city of ...................., in said county on the ......... day of ................, A. D. 19....

Present Honorable ....................., Circuit Judge.

This cause having come on to be heard upon the pleadings and proofs taken therein in open court, and having been argued by counsel for the parties respectively, and the court being fully advised in the premises, and it appearing to the court that the material allegations in the bill of complaint contained are true, and that the marriage mentioned in said bill was procured by the defendant by force, fraud and misrepresentation on the part of said defendant, and that the equities of the case are with the plaintiff:

On motion of ......................., attorney for said plaintiff, it is ordered, adjudged and decreed by the court now here that the said marriage between the plaintiff and the defendant be declared and the same is hereby declared to be absolutely void and said marriage is hereby annulled.

And it is further ordered, adjudged and decreed that the said defendant pay to the said plaintiff the costs of this suit to be taxed and that execution issue therefor.

..................................
Circuit Judge.

Examined, countersigned and
entered by me,

..................................
Clerk.

## No. 54. Decree Affirming Marriage.

STATE OF MICHIGAN.
The Circuit Court for the County of ........ —In Chancery.

.................................
Plaintiff,
v.
.................................
Defendant.

At a session of said court held at the courthouse in the city of .................. in said county on the ........... day of ..................., A. D. 19....

Present Honorable ......................, Circuit Judge.

This cause having come on to be heard upon the pleadings of the respective parties on file, and the proofs taken therein in open court, and having been argued by counsel for the parties respectively, and the court being fully advised in the premises, and it appearing to the court that the material allegations in the bill of complaint contained are true and that the said marriage between the plaintiff and the defendant was and is in all respects lawful and in accordance with the laws of this state, and that the equities of the case as set forth in said bill are with the plaintiff:

Therefore, upon due consideration thereof it is ordered, adjudged and decreed by the court now here that the said marriage between the plaintiff and the defendant in this cause, be and the same is hereby in all things affirmed.

It is further ordered, adjudged and decreed that the said defendant pay to the said plaintiff the costs of this suit to be taxed, including an attorney fee of $......, and that in case of non-payment, execution may issue therefor.

.................................
Circuit Judge.

Examined, countersigned and
entered by me,
.................................
Clerk.

## No. 55. Petition for Re-Hearing.

(See Text, §467.)

STATE OF MICHIGAN.
The Circuit Court for the County of ......... —In Chancery.

.................................
Plaintiff,
v.
.................................
Defendant.

To the Circuit Court for the County of ...... —In Chancery.

The petition of ......................., the above named defendant respectfully shows:

I.

That on the ......... day of .............., A. D. 19...., a decree was made in the above entitled cause by this court, wherein and whereby it was, among other things, ordered, adjudged and decreed *(state part of decree complained of).*

II.

That so much of the said decree above recited is erroneous because *(state reasons in full).*

III.

That said decree has been settled, signed and entered, but not yet enrolled.

Wherefore, your petitioner prays that the court will grant a re-hearing of the said cause, he the said petitioner, submitting to pay such costs as the court shall award in case this complaint shall be found to be groundless.

................................

Attorney for Petitioner.

................................

(Usual Verification).

We certify that we have examined the case referred to in the foregoing petition and are of opinion that the decree therein mentioned is erroneous in the particulars mentioned in said petition.

................................

Attorney for ................

................................

Of Counsel for..............

**No. 56. Order for Re-Hearing.**

(See Text, §467.)

STATE OF MICHIGAN.
The Circuit Court for the County of ......... —In Chancery.

.................................

Plaintiff,

v.

.................................

Defendant.

At a session of said court held at the courthouse in the city of ...................., in said county on the ........... day of ...................., A. D. 19....

Present Honorable ...................., Circuit Judge.

In this cause on reading and filing the petition duly verified of the above named defendant, ...................., with a certificate of .................... and .................... counsel of this court thereto attached:

On motion of ...................., attorney, and of counsel for the said defendant and counsel for the plaintiff having been heard in opposition thereto, it is ordered that a re-hearing be had in said cause as to the matters complained of in the said petition in this court on the ......... day of ............, A. D. 19.... *(or at the next term of this court)*, and that in the meantime all proceedings in said cause against said petitioners ...................., on said decree be stayed.

.................................

Circuit Judge.

Examined, countersigned and
entered by me.

.................................

Clerk.

## No. 57. Order Denying Re-Hearing.

(See Text, §467.)

STATE OF MICHIGAN.
The Circuit Court for the County of ........ —In Chancery.

.................................

Plaintiff,

v.

.................................

Defendant.

At a session of said court held at the courthouse in the city of .................... in said county on the .......... day of ......................, A. D. 19....

Present Honorable ........................, Circuit Judge.

This cause came on to be heard upon the petition of the defendant therein duly verified and was argued by counsel for the parties respectively, and it appearing to the court that there is no error in the decree heretofore and on the ........ day of .................., A. D. 19...., entered in said cause therefor.

On motion of ........................., attorney, and of counsel for defendant, counsel for the plaintiff, having been heard in opposition thereto it is ordered that a re-hearing of said cause be and the same is hereby denied.

................................

Circuit Judge.

Examined, countersigned and
entered by me,

................................

Clerk.

### No. 58. Certificate of Enrollment.

(See Text, §468.)

STATE OF MICHIGAN.
The Circuit Court for the County of ........ —In Chancery.

................................
Plaintiff,
v.
................................
Defendant.

I, the undersigned, Clerk of said court, do hereby certify that thirty days have elapsed since the entry of the decree in the above entitled cause and that on this date I have attached together for the purpose of enrollment the bill of complaint, subpoena, pleadings, proofs, taxed bill of costs, a fair copy of final decree signed by the Honorable ......................., Circuit Judge, and countersigned by the Clerk of this court, together with all of the other papers filed in this cause and annexed thereto this certificate according to the statute in such case made and provided.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this ........ day of ............, A. D. 19....

..................................

Clerk.

L. S.

### No. 59. Discharge and Satisfaction of Decree.

(See Text, §469.)

STATE OF MICHIGAN.
The Circuit Court for the County of ........ —In Chancery.

..................................
Plaintiff,
v.
..................................
Defendant.

(Caption).

In the above entitled cause on reading and filing the stipulation of the parties thereto, signed and approved by their attorneys respectively, it is ordered that the decree heretofore and on the ......... day of ..............., A. D. 19...., entered in said cause be and the same is hereby fully satisfied and discharged.

..................................

Circuit Judge.

Examined, countersigned and
entered by me,

..................................

Clerk.

### No. 60. Petition for Discharge of Decree.

(See Text, §469.)

STATE OF MICHIGAN.
The Circuit Court for the County of ........ —In Chancery.

..................................
Plaintiff,
v.
..................................
Defendant.

To the Court:

Your petitioner ......................., represents unto this honorable court as follows:

I.

That heretofore and on to-wit: the ........ day of ........ A. D. 19...., the final decree was entered in this cause requiring your petitioner to pay to the plaintiff the sum of $......, and the costs of said suit to be taxed.

II.

Your petitioner further shows that he has complied with said decree in all respects and has paid to the attorney for said plaintiff the said sum of money required by said decree to be paid and that said plaintiff has refused and still does refuse to satisfy and discharge said decree.

Your petitioner therefore prays that an order may be made by this court discharging and satisfying said decree and releasing your petitioner from any obligation thereon and that your petitioner may have such other or further relief as to the court may seem proper and as shall be agreeable to equity and good conscience.

..............................

Petitioner.

State of Michigan,
County of.........  } ss.

On this ......... day of ............, A. D. 19.... before me, the undersigned, a Notary Public, in and for said county, personally came ......................... to me, known to be the same person who signed the foregoing petition and who being by me duly sworn deposes and says that he has heard read the foregoing petition by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge except as to such matters as are therein stated to be on his information and belief and as to those matters he believes it to be true.

..............................

Subscribed and sworn to before me this ......... day of ................, A. D. 19....

..............................

Notary Public.

My Commission expires .....................

## No. 61. Order Discharging Decree.

(See Text, §469.)

STATE OF MICHIGAN.
The Circuit Court for the County of ........ —In Chancery.

..................................
Plaintiff,
v.
..................................
Defendant.

At a session of said court held at the courthouse in the city of ................ in said county on the ........ day of ................., A. D. 19....

Present Honorable ....................., Circuit Judge.

This cause came on to be heard upon the petition of the defendant therein for a discharge of the decree heretofore entered in said cause and after hearing counsel for the parties respectively and upon reading said petition and the affidavits and other proofs in support thereof and the affidavits and testimony in opposition thereto, it appearing to the court that the said defendant has in all respects complied with the said decree, it is ordered that said decree be and the same is hereby declared to be fully paid, satisfied and discharged.

It is further ordered that the said plaintiff pay to the said defendant an attorney fee of $...... and the costs of hearing of said petition to be taxed.

..................................
Circuit Judge.

Examined, countersigned and
entered by me,

..................................
Clerk.

## No. 62. Order Denying Discharge of Decree.

(See Text, §469.)

STATE OF MICHIGAN.
The Circuit Court for the County of ....... —In Chancery.

..................................
Plaintiff,
v.
..................................
Defendant.

At a session of said court held at the courthouse in the city of ................ in said county on the ......... day of ................, A. D. 19....

Present Honorable ......................, Circuit Judge.

This cause came on to be heard upon the petition of the defendant therein praying for an order discharging and satisfying the decree heretofore entered in said cause. On reading said petition and the affidavits and other proofs in support thereof and the affidavits and testimony in opposition thereto and after hearing counsel for the parties respectively, and it appearing to the court that said decree has not been complied with in all respects it is ordered, adjudged and decreed that the prayer of said petition be and the same is hereby denied.

It is further ordered that the plaintiff pay to the defendant the costs of the hearing on said petition to be taxed including an attorney fee of $......

............................

Circuit Judge.

Examined, countersigned and
entered by me,

................................

Clerk.

### No. 63. Order Directing Prosecuting Attorney to Appear and Defend.

(See Text, §474.)

STATE OF MICHIGAN.
The Circuit Court for the County of ........ —In Chancery.

................................

Plaintiff,

v.

................................

Defendant.

At a session of said court held at the courthouse in the city of ................ in said county on the ......... day of ................A. D. 19....

Present Honorable ......................, Circuit Judge.

In the above entitled cause it having been made to appear to this court that the public good requires that a defense be made in said cause by the Prosecuting Attorney of said county, it is ordered that said Prosecuting Attorney cause his appearance to be entered in said cause within .......... days from this date and procure a copy of the bill of complaint therein and make due and proper investigation as to the facts and circumstances of said cause and to appear on the hearing thereof and defend unless by the further order of this court and upon the report of said Prosecuting Attorney it shall appear to the court that such defense is not necessary.

It is further ordered that the said Prosecuting Attorney make a report to this court of his investigation therein and await the further direction of the court.

..................................
Circuit Judge.

Examined, countersigned and
entered by me,

..................................
Clerk.

## No. 64. Report of Prosecuting Attorney.

(See Text, §474.)

STATE OF MICHIGAN.
The Circuit Court for the County of ..........,—In Chancery.

..................................
Plaintiff,
v.
..................................
Defendant.

To the Circuit Court for ............ County.

I, ..............., the Prosecuting Attorney of said county, do hereby respectfully report to the court that I have procured a copy of the bill of complaint in the above entitled cause, caused my appearance to be entered in said cause and have investigated the matters set forth in said bill of complaint and after a full and careful investigation of said cause I believe that there is collusion between the parties thereto and that the interests of the public require that a defense be made by the Prosecuting Attorney of said county all of which is respectfully submitted.

Dated this ............ day of ............, A. D. 19....

..................................
Prosecuting Attorney.

## No. 65. Order Appointing an Attorney to Defend.

(See Text, §476.)

STATE OF MICHIGAN.
The Circuit Court for the County of .........., In Chancery.

..............................
Plaintiff,
v.
..............................
Defendant.

At a session of said court held at the court house in the city of ........... in said county on the ........... day of ..........., A. D. 19....

Present Honorable ..............., Circuit Judge.

In the above entitled cause it appearing from the bill of complaint on file in this court that there are minor children of said marriage under the age of ......... years and it further appearing that the Prosecuting Attorney of said county is disqualified by reason of his being engaged as counsel for one of the parties to said cause:

It is therefore ordered that ............. of the city of ........... in said county, an attorney of this court be and he is hereby appointed and directed to appear in said cause on behalf of said minor children and the interests of the public and defend the same.

..............................
Circuit Judge.

Examined, countersigned and
entered by me,

..............................
Clerk.

## No. 66. Claim of Appeal.

(See Text, §479.)

STATE OF MICHIGAN.
The Circuit Court for the County of .........., In Chancery.

..............................
Plaintiff,
v.
..............................
Defendant.

To the Clerk of said Court:

Now comes the above named defendant .............. (*or plaintiff*) and hereby claims the benefit of an appeal to the Supreme Court of this state from the final decree of said court made and rendered in this cause by the above named court on the ............ day of ............, A. D. 19....

The sum of $5.00 for the Clerk's fee for making return to said appeal is herewith paid.

Dated this ............ day of ............, A. D. 19....

................................

Attorney for ...............

## No. 67. Notice of Appeal and of Application for Approval of Bond.

(See Text, §479.)

STATE OF MICHIGAN.
The Circuit Court for the County of .........., In Chancery.

...............................
Plaintiff,
v.
...............................
Defendant.

To..................., Attorney for ................

Sir:

Please take notice that ..........., the defendant in the above entitled cause, has appealed to the Supreme Court of this state from the final decree made therein on the .......... day of ..........., A. D. 19.... by the Circuit Court for the county of .............., In Chancery, and that a bond for costs and damages and to stay proceedings in said cause pending such appeal, in the penal sum of $.............. with ............ and .............., both of the ............ of .............. in said county of .............. as sureties, a copy whereof is hereto annexed, has been duly executed and an application will be made to the Honorable ..........., Circuit Judge, at his Chambers in the city of ............ in said county on the ............ day of ..........., A. D. 19.... at ........ o'clock in the ......noon for the approval of said bond and the penalty thereof and the sureties thereto.

Dated this ............ day of ............, A. D. 19....

................................

Attorney for .................

## No. 68. Bond on Appeal.

(See Text, §479.)

KNOW ALL MEN BY THESE PRESENTS, that we, ...................., of the city of .............. in the county of ........... and state of ............, as principal, and ........... and ........... of the ........... of ................, county of .............. and state of Michigan as sureties, are held and firmly bound unto ................ of ............ in the sum of $........, lawful money of the United States; to be paid to the said .......... or to his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves and our heirs, executors, administrators and each and every of them jointly and severally firmly by these presents.

Sealed with our seals and dated this ........... day of ........... A. D. 19....

WHEREAS the above bounden ..................... has appealed to the Supreme Court of the state of Michigan from a decree made by the Circuit Court for the county of ............In Chancery, in a cause in said court wherein the said ........... is plaintiff and the above bounden ........... defendant.

NOW THEREFORE, the condition of this obligation is such that if the above bounden ..................... shall diligently prosecute his said appeal to effect and shall perform and satisfy such decree or order as the said Supreme Court shall make in said cause, and shall pay all costs of the said ............... therein that said Supreme Court shall award to be paid by him, the said ............., then this obligation to be void, otherwise to remain in full force.

............................(L. S.)
............................(L. S.)
............................(L. S.)

Due proof of service of notice of application for the approval of the within bond having been filed: the within bond and the penalty thereof and the sureties thereto are hereby approved.

Dated this ........... day of ..........., A. D. 19....

..............................

Circuit Judge.

## No. 69. Case on Appeal.

(See Text, §482.)

STATE OF MICHIGAN.
The Circuit Court for the County of .........., In Chancery.

..............................
Plaintiff,
v.
..............................
Defendant.

At a session of the said court held at the court house in the city of ............. in said county on the ........... day of ............., A. D. 19...., before the Honorable ............., Judge of the said court, this cause came on for hearing on examination of witnesses in open court as in a suit at law, and thereupon the said plaintiff appeared by ............., his counsel, and the defendant also appeared by ............., his counsel: and thereupon the counsel for the plaintiff called as a witness .................... who, having been duly sworn testified in substance as follows:

I reside at ........... and am ........... years of age (*state substance of testimony in narrative form except in such particular instances where a statement by question and answer is necessary to a full understanding of the meaning of the witnesses. Where a question is asked which was objected to at the time and it is desired to preserve the benefit of the objection state as follows*): and thereupon the counsel for the plaintiff asked the said witness the following question:
Q. (*state question verbatim*).
to which counsel for the defendant objected because (*state reasons for objection as given at the time*) and the witness answered (*state answer, etc., as to all evidence objected to*). (*After the direct examination say*): on cross examination the said witness testified in substance (*state the testimony as in the direct*).

On re-direct examination the said witness testified in substance (*state testimony, etc., with each witness for plaintiff, then say*); the plaintiff thereupon rested and counsel for the defendant called as a witness one ............. who having been duly sworn testified in substance as follows: (*if any exhibits such as letters or other documents are introduced in evidence they should be recited in the case at the proper* *places respectively as follows*) : whereupon the counsel for the plaintiff offered and read in evidence plaintiff's Exhibit A which reads as follows: (*insert copy of exhibit*) (*state as follows*) : thereupon upon the .......... day of .......... the testimony and proofs in this case were closed and afterwards and on the ............ day of ............ A. D. 19.... this cause having been in the meantime argued by counsel and the court having taken the same into consideration the said Circuit Court made its decree therein in favor of the said ............ and against the said .......... (*the substance of the decree may be briefly stated*) which said decree was made on the ............ day of ............, ............, entered in this cause. Thereupon I, the undersigned, the Circuit Judge before whom the said evidence was taken and this cause was tried, do hereby certify that the foregoing case and transcript contains the substance of all of the evidence given in the said cause, and that in that part thereof wherein the testimony of witnesses is set forth (question and answer, the setting forth of such questions and answers as is necessary to a full understanding of the evidence and the questions involved).

Wherefore I have duly settled and signed this transcript containing the substance of all the evidence in this cause this ............ day of ............, A. D. 19....

..............................

Circuit Judge.

## No. 70. Notice of Settling Case on Appeal.

(See Text, §482.)

STATE OF MICHIGAN.
The Circuit Court for the County of .........., In Chancery.

..............................
Plaintiff,
vs.
..............................
Defendant.

To ..............., attorney for plaintiff (*or defendant as the case may be*).

Sir:—

Take notice that the annexed is a copy of a transcript of the substance of the evidence taken in this cause and that application will be made to the Honorable ................, Judge of the said court, before whom this cause was tried, at his Chambers in the city of .........., county of .......... and state of Michigan on the ........... day of ..........., A. D. 19.... at ........ o'clock in the ........noon to settle and sign the same.

Dated this ............ day of ............, A. D. 19....

..................................

Attorney for ..............

## No. 71. Notice of Amendments to Case on Appeal.

(See Text, §483.)

STATE OF MICHIGAN.
The Circuit Court for the County of .........., In Chancery.

...............................
Plaintiff.
v.
...............................
Defendant.

To ................, attorney for ...................

Sir:—

Please to take notice that I shall propose the following amendments to the proposed case on appeal of the substance of the evidence in this cause, viz:

First amendment, on line ...., page .... of the said proposed case strike out the words .......... and insert the words ...........

Second amendment, on line .... of page .... after the words .......... insert the words ..........

Third amendment, on line .... of page .... strike out the words .......... and all thereafter to and including the word .......... on line ...., page ....

*(And so on designating all changes desired.)*

Dated this ............ day of ............, A. D. 19....

..................................

Attorney for ...........

# APPENDIX

## A NOTE ON THE FULL FAITH AND CREDIT CLAUSE

BY FRANKLIN A. BEECHER

And the Leading Cases of

## ATHERTON V. ATHERTON AND HADDOCK V. HADDOCK.

# HISTORY

Atherton v. Atherton, 82 Hun 179, 31 N. Y. S. 977, 64 N. Y. St. Rep. 798, 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650, 181 U. S. 155, 21 S. Ct. 544, 45 L. Ed. 794.

Haddock v. Haddock, 75 App. Div. 565, 78 N. Y. S. 304, 12 N. Y. Ann. Cas. 14, 76 App. Div. 620, 79 N. Y. S. 1133, 178 N. Y. 557, 70 N. E. 1099, 109 App. Div. 502, 96 N. Y. S. 522, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867.

# APPENDIX

## A NOTE ON THE FULL FAITH AND CREDIT CLAUSE.

Article IV, Section 1, of the Constitution of the United States reads as follows: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceeding shall be proved and the effect thereof."

The object and purpose of this provision is to give to the public acts, records and proceedings of a state the same full faith and credit in other states that they have in their own state.[1] Thus the effect is to secure to a judgment rendered in one state the same full faith and credit in the other states that it had in the state where rendered. In a case,[2] Mr. Justice Marshall said: "The doctrine * * * was, that the judgment of a State court should have the same credit, validity and effect in every other court in the United States, which it had in the State where it was pronounced, and that whatever pleas would be good to a suit therein in such State, and none others, could be pleaded in any other court in the United States." It was not intended by this provision to confer a new jurisdiction, but to regulate the effect of the acknowledged jurisdiction over persons and things within the state.

Pursuant to the power vested in Congress by this provision that body passed an act[3] which provided that, "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seal of such Territory or State, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." This statute does not preclude a state from passing laws by which such further rules are made, concerning the authentication of foreign judgments, as may be deemed necessary, but they must not be inconsistent with the act of congress. Furthermore the statute does not render evidence inadmissible to prove such a judgment in a manner which could be sufficient at common law.[4] However, it is the settled construction of this constitutional provision and the statute passed by congress in support of it, that a judgment of a state court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is conclusive upon its merits in the courts of every other state, and is given the rights to as much force and effect against the person summoned or the property attached as it has in the state in which the judgment was rendered, whenever the question is raised for decision in another state.[5] Thus it is essential that the court has jurisdiction of the parties and the subject-matter. In a case[6] the court said: "Without that provision of the Constitution of the United States which declares that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,' and the Act of Congress passed to carry it into effect, it is clear that the record in question would not be conclusive as to the facts necessary to give the justices of Monmouth County jurisdiction, whatever might be its effect in New Jersey. In any other state it would be regarded like any foreign judgment; and as to a foreign judgment it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or the thing. 'Upon principle,' says Chief Justice Marshall, 'it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property, upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without, their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence.' Rose v. Himely, 4 Cranch, 269. To the same effect see Story on the Constitution, chap. XXIX; 1 Greenleaf on Evidence, § 540.

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[1] Hampton v. McConnell, 3 Wheaton 234.

[2] Hampton v. McConnell, 3 Wheaton 234.

[3] Rev. Stat. U. S. §905.

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[4] Gaines v. Relf, 12 How. 472; White v. Bamley, 20 How. 235.

[5] Maxwell v. Stewart, 22 Wall. 77; Mills v. Duryea, 7 Cranch, 481; Hampton v. McConnell, 3 Wheaton 234; McElmoyle v. Cohen, 13 Pet. 312; Christmas v. Russell, 5 Wall, 290; Green v. VanBuskirk, 7 Wall, 139; Cooper v. Reynolds, 10 Wall, 308; Insurance Co. v. Harris, 97 U. S. 331.

[6] Thompson v. Whitman, 18 Wall, 457.

"The Act of Congress above referred to, which was passed 26th of May, 1790, after providing for the mode of authenticating the acts, records and judicial proceedings of the States, declares, 'and the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken.' It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each state equivalent to domestic judgments in every other state, or at least of giving to them in every other state the same effect, in all respects which they have in the state where they are rendered. And the language of this court in Mills v. Duryea, 7 Cranch, 484, seemed to give countenance to this idea. The court in that case held that the act gave to the judgments to each state the same conclusive effect, as records, in all the states, as they had at home; and that nil debet could not be pleaded to any action brought thereon in another state. This decision has never been departed from in relation to the general effect of such judgments where the questions raised were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed." In conclusion the court said: "On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceedings in another state, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

Jurisdictional questions concerning the validity and effect of judgments rendered in another state most frequently have their source in cases where judgments were rendered against non-residents. The doctrine is well settled that judicial process of a state has no force or efficacy beyond the territorial limits in which it was issued. Process issued in one state and served in another cannot effect an appearance, for in such cases, the service is purely constructive in nature, and this statement is equally true of service by publication or advertisement; and, furthermore, it is by none of these modes of service that courts of the state can acquire jurisdiction for the purpose of rendering a personal judgment against a defendant valid in other states, for where the only service of process on the defendant was constructive, a judgment rendered in an action brought against him in a state is not valid or binding in the courts of any other state.

In divorce proceedings the general rule may be laid down that where a decree of divorce was rendered against a defendant who was either personally served or entered his appearance, such judgment is sufficiently efficacious to entitle it to the protection of the full faith and credit provision of the Constitution,[7] for when a suit for divorce is instituted in a state court of competent jurisdiction and the defendant is personally served, or he enters his appearance, jurisdiction is given to the court to render a judgment not only valid in the state where the suit was brought but valid in every other state. But a divorce granted against a non-resident upon constructive service of process is only valid in the state in which it was granted, and has no extra-territorial effect as to property rights, alimony and custody of minor children.[8] In a case,[9] the court speaking of foreign divorces in which judgments were rendered on constructive service, said: "Under the laws of the state we permit a husband or wife, as the case may be, to obtain a valid divorce by service of the summons by publication upon the defendant residing in another jurisdiction, yet we do not recognize as valid a judgment of divorce obtained by a husband or wife in a sister state, unless the defendant has been personally served with process in that jurisdiction, or has appeared and submitted himself to the jurisdiction of that court. The Constitution of the United States requires that 'full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state,' and it is said that the comity of states and of nations, as well as public policy, require one jurisdiction to observe as valid a marriage legally contracted in another jurisdiction. Seemingly we do neither."

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[7] Cheever v. Wilson, 9 Wall. 108, 19 L. Ed. 804.

The full faith and credit provision was not infringed where the Massachusett's courts under Massachusett's Public Statutes, chap. 1 and 6, § 17, refused to give effect to a decree of divorce by a court of another state to a citizen of the State of Massachusetts, where he was domiciled, but who had temporarily resided in another state for the purpose of obtaining a divorce on grounds which happened while the parties resided there, but these grounds did not constitute a sufficient cause in Massachusetts.[10]. In a case[11] which had its origin in Kentucky by the husband and later proceedings were instituted in New York by the wife, the court refused to give recognition to the validity of the decree granted in Kentucky to the husband where the wife had abandoned him and resided in New York, for the reason that the wife had been only constructively served. This case was reversed, upon appeal to the United States Supreme Court. It was decided there[12] that the decree was a judgment entitled to full faith and credit in every other state in the Union in accordance with the purport of the constitutional provision. In this case the court said: "This case does not involve the validity of a divorce granted, on constructive service, by the court of a state in which only one of the parties ever had a domicile; nor the question to what extent the good faith of the domicile may be afterwards inquired into. In this case, the divorce in Kentucky was by the court of the state which had always been the undoubted domicile of the husband, and which was the only matrimonial domicile of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky." Again, in a case,[13] it was decided that where a husband abandoned his wife without justifiable cause and goes to another state where he becomes domiciled; while the wife remains in the matrimonial domicile, her domicile cannot become constructively that of the husband, and the mere fact that the domicile within the state of one party to the marriage contract does not give that state jurisdiction, where the husband was only constructively served and did not appear, to render a decree of divorce, i. e., a judgment enforceable in all other states of the United States by virtue of the full faith and credit provision of the constitution.

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[8] Hekking v. Pfaff, 82 Fed. Rep. 403.

[9] Hamilton v. Hamilton, 56 N. Y. Supp. 122.

[10] Andrews v. Andrews, 186 U. S. 14, 47 L. Ed. 366, 23 Sup. Ct. Rep. 237.

[11] Atherton v. Atherton, 155 N. Y. 129, 49 N. E. 933.

[12] Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. Rep. 544.

The cases of Atherton v. Atherton and Haddock v. Haddock present the question as to whether the provision of the Federal Constitution requiring full faith and credit to be given in each state to the judicial proceedings of every other state applies to divorce proceedings, where the plaintiff only is domiciled within the territorial jurisdiction of the court granting the decree and service on the defendant residing in another state is by publication only.

The statement of facts and the opinions in those two cases are published in full in this appendix, as affording a ready and convenient reference to the subject of the conflict of divorce laws in this country, as well as the construction put upon the full faith and credit clause of the constitution by the Supreme Court of the United States.

It has sometimes been said that the case of Haddock v. Haddock overrules, in effect, former decisions of the same court, and especially the decision in Atherton v. Atherton, and a superficial reading of the statements of facts and the prevailing opinions in these two cases is liable to lead one to such conclusion. But a careful reading of the statement of facts prepared by Mr. Justice Gray in the case of Atherton v. Atherton, and comparison with the facts and prevailing opinion in Haddock v. Haddock, will show that the decisions in the two cases are not materially conflicting.

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[13] Haddock v. Haddock, 201 U. S. 562.

The distinguishing features of the facts upon which these two cases were decided are pointed out in another part of this work. (Sec. 39, page 40.)

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## ATHERTON *v.* ATHERTON.

For the official reference, see the second page of this Appendix.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 17. Argued December 15, 1899.—Decided April 15, 1901.

A husband and wife had their matrimonial domicil in Kentucky, which was the domicil of the husband. She left him there, and returned to her mother's at Clinton in the State of New York. He filed a petition against her in a court of Kentucky for a divorce from the bond of matrimony for her abandonment, which was a cause of divorce by the laws of Kentucky; and alleged on oath, as required by the statutes of Kentucky, that she might be found at Clinton, and that Clinton was the post-office nearest the place where she might be found. The clerk, as required by those statutes, entered a warning order to the wife to appear in sixty days, and appointed an attorney at law for her. The attorney wrote to her at Clinton, advising her of the object of the petition, and enclosing a copy thereof, in a letter addressed to her by mail at that place, and having on the envelope a direction to return it to him, if not delivered in ten days. A month later, the attorney, having received no answer, made his report to the court. Five weeks afterwards, the court, after taking evidence, granted the husband an absolute decree of divorce for the wife's abandonment of him. *Held*, that this decree was a bar to the wife's petition for a divorce in New York.

### Statement of the Case.

THIS was a suit brought January 11, 1893, in the Supreme Court of the State of New York, by Mary G. Atherton against Peter Lee Atherton, for a divorce from bed and board, for the custody of the child of the parties, and for the support of the plaintiff and the child, on the ground of cruel and abusive treatment of the plaintiff by the defendant. The defendant appeared in the case; and at a trial by the court without a jury at June term, 1893, the court found the following facts:

On October 17, 1888, the parties were married at Clinton, Oneida County, New York, the plaintiff being a resident of that place, and the defendant a resident of Louisville, Kentucky. Immediately after the marriage, the parties went to and resided at Louisville, in the house with the defendant's parents, had a child born to them on Jan. 8, 1890, and there continued to reside as husband and wife until October 3, 1891. Then, owing to his cruel and abusive treatment, without fault on her part, she left him, taking the child with her, and in a few days thereafter, returned to her mother at Clinton, and has ever since resided there with her mother, and is a resident and domiciled in the State of New York, and has not lived or cohabited with the defendant. When she so left him and went to Clinton, she did so with the purpose and intention of not returning to the State of Kentucky, but of permanently residing in the State of New York; and this purpose and intention were understood by the defendant at the time, and were contemplated and evidenced by an agreement entered into, at Louisville, October 10, 1891, by the parties and one Henry P. Goodenow, under advice of counsel, which is copied in the margin.[1] The defendant continued to

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[1] The undersigned, Peter Lee Atherton, and his wife, Mary G. Atherton, having ceased to live together as man and wife, without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequence which may follow, or right which may arise to either party if such status shall continue, desire to provide for the best interest of their child, Mary Valeria Atherton. With this view they have entered into the following agreement:

Peter Lee Atherton contracting with Henry P. Goodenow as trustee for Mary G. Atherton, and said trustee contracting with Peter Lee Atherton on behalf and jointly with Mary G. Atherton.

1. The child is hereby committed for its nurture, education and control to the joint custody and guardianship of her mother, Mary G. Atherton, and her paternal grandmother, Maria B. Atherton, on the following basis:

The domicil of the child is to be the State of Kentucky. The mother is to have the child until January 1, 1892. During the years 1892, 1893 and 1894 the grandmother is to have the child and control its abode, travel and custody from January 1st to the first week in May; and the mother from the first week in May to December 31st. After that period, during the existence of this arrangement, the grandmother's custody, control, etc., is to exist during the first four and last two months of the year; that of the mother during the other months of the year.

2. During that part of each year in which the child is under the control of the mother, Peter Lee Atherton is to pay into the hands of Mary G. Atherton $500 in installments of equal amounts at the beginning of each of the months of said control, for the comfortable maintenance of

reside in Louisville, and is a resident of the State of Kentucky.

The defendant, in his answer, besides denying the cruelty charged, set up a decree of divorce from the bond of matrimony, obtained by him against his wife March 14, 1893, in a court of Jefferson County in the State of Kentucky, empowered to grant divorces, by which "This action having come on to be heard upon the pleadings, report of attorney for the absent defendant, and the evidence and the court being advised, it is considered by the court that the plaintiff, Peter Lee Atherton, has resided in Jefferson County, Kentucky, continuously for ten years last past; and that he and the defend-

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the child. During the rest of each year, he is to himself at his sole expense provide for the support of the child. The expense of conveying the child, with a proper attendant in the journey, to the mother, Mary G. Atherton, is to be borne by the father, Peter Lee Atherton, and the like expense, on the journey back to the grandmother, is to come out of the sum provided for the child's support.

3. Peter Lee Atherton is to pay into the hands of Mary G. Atherton for her support $125 at the beginning of each month, until this agreement does by its own terms end. This is to be taken in lieu of alimony and dowable and distributable share in his estate.

4. The following provisions are made for the termination of this agreement, and for the contingency of various events that may happen in the future; among others, divorce and second marriage of Peter Lee Atherton or Mary G. Atherton.

*a.* This agreement as to the child is to terminate on her arrival at fourteen years of age, it being recognized that she will then be old enough to choose for herself. It shall, of course, in like manner terminate at her death.

*b.* This agreement as to the support of Mary G. Atherton is to end at her death, or upon her again marrying, and in any event on the 8th day of January, 1904.

*c.* If Mary G. Atherton shall marry again or die, the person then being joint guardian with her of the child shall become its sole guardian. If Maria B. Atherton shall die while she is joint guardian, Peter Lee Atherton, if alive, or if he be dead, his father, John M. Atherton, shall choose a successor in the joint guardianship; and if Mary G. Atherton objects to the person so nominated, the senior (in years) judge of the Jefferson circuit court shall decide the question of fitness, and confirm or reject such nomination.

*d.* A successor to said successor may under similar circumstances be in like manner chosen.

*e.* If, during the existence of this agreement, Mary G. Atherton being then joint guardian, John M. Atherton and Maria B. Atherton shall die, and Peter Lee Atherton die or be or become married, the sole guardianship shall rest in said Mary G. Atherton.

*f.* If, during the lives of Peter Lee Atherton and Mary G. Atherton, a sole guardianship shall have resulted under the terms of this agreement, each parent shall have reasonable access to and right of visitaant, Mary G. Atherton, were married on the 17th day of October, 1888; that from the date of said marriage the said plaintiff and defendant resided in Jefferson County, Kentucky; that while the plaintiff and defendant were thus residing in Jefferson County, Kentucky, to wit, in the month of October, 1891, the defendant, Mary G. Atherton, without fault upon the part of the plaintiff, abandoned him, and that said abandonment has continued without interruption from that time to this, and at the filing of the petition herein had existed for more than one year; that the defendant, Mary G. Atherton, had, at the filing of the petition herein, been absent from this State for more than four months; that therefore it is further considered and adjudged by the court that the plaintiff, Peter Lee Atherton, is entitled to the decree of divorce prayed for in this petition, and that the bonds of matrimony between the said plaintiff, Peter Lee Atherton, and the said defendant, Mary G. Atherton, be and they are hereby dissolved."

By the record of that decree, duly verified, the following appeared: On December 28, 1892, the plaintiff filed a petition under oath, containing the same statements as the decree, and also stating "that the said defendant may be found in Clinton, State of New York, and that in said Clinton is kept the post-office which is nearest to the place where the defendant may be found." On the same day, pursuant to the requirements of the statutes of Kentucky, the clerk made an order, warning the defendant to appear within sixty days and answer the petition, and appointing John C. Walker, an attorney of the court, to defend for her and in her behalf, and to inform her of the nature and pendency of the suit. On February 6, 1893, Walker filed his report, in which he stated: "On this, the 5th day of January, 1893, I wrote to said defendant, Mary G. Atherton, at Clinton, in the State of New York, fully advis-

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tion from the child, notwithstanding such parent may have again married.

*g.* If a divorce shall be granted, this agreement, so far as it concerns provision for Mary G. Atherton, shall be carried into the decree, as in full satisfaction of all claim for alimony, and so far as concerns provision for and custody of the child, reserving to the court the usual power to provide against events and contingencies not covered by this agreement.

Witness the signatures of all the parties this October 10th, 1891.

HENRY P. GOODENOW.
MARY G. ATHERTON.
PETER LEE ATHERTON.

ing her of the objects and purposes of this action, stating therein a substantial copy of the petition, &c., plainly directed said letter to her at said place, paid the postage, had printed on the envelope enclosing it, 'If not delivered in ten days return to Jno. C. Walker, attorney at law, No. 516 West Jefferson street, Louisville, Ky.' Said letter has not been returned to me. I have received no answer thereto from said defendant or any one else for her, and do not know nor am I advised of any defence to make for her, and make none, only that which the law in such cases makes for non-resident defendants." The agreement of October 10, 1891, before mentioned, and certain depositions, set forth in full, taken at various dates from February 23 to March 3, 1893, were filed in the cause in Kentucky before the hearing.

It was agreed that either party might refer to any statute of the State of Kentucky, or decision of its courts.

The Supreme Court of New York found that the wife "was not personally served with process within the State of Kentucky, or at all, nor did she in any manner appear, or authorize an appearance for her, in the said action and proceeding;" and that before the commencement of that suit, and ever since, she had ceased to be a resident of Kentucky, and had become and was a resident of the State of New York, domiciled and residing in Clinton, with her child.

The court decided that the decree in Kentucky was inoperative and void as against the wife, and no bar to this action; and gave judgment in her favor for a divorce from bed and board, and for the custody of the child, and for the support of herself and the child.

That judgment was affirmed by the general term of the Supreme Court of New York, and by the Court of Appeals of the State. 82 Hun, 179; 155 N. Y. 129.

The defendant sued out this writ of error, on the ground that the judgment did not give full faith and credit to the decree of the court in Kentucky, as required by the Constitution and laws of the United States.

*Mr. Alexander Pope Humphrey* for plaintiff in error. *Mr. George M. Davie* was on his brief.

*Mr. William Kernan* for defendant in error.

Mr. Justice Gray, after stating the case as above, delivered the opinion of the court.

### Opinion of the Court.

The first section of the fourth article of the Constitution of the United States is as follows: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." This section was intended to give the same conclusive effect to the judgments of all the States, so as to promote certainty and uniformity in the rule among them. And Congress, in the exercise of the power so conferred, besides prescribing the manner in which the records and judicial proceedings of any State may be authenticated, has defined the effect thereof, by enacting that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." Rev. Stat. § 905, reënacting act of May 26, 1790, c. 11, 1 Stat. 122; *Huntington* v. *Attrill,* (1892) 146 U. S. 657, 684.

By the General Statutes of Kentucky of 1873, c. 52, art. 3, courts of equity may grant a divorce for abandonment by one party of the other for one year; petitions for divorce must be brought in the county where the wife usually resides if she has an actual residence in the State; if not, then in the county of the husband's residence; and shall not be taken for confessed, or be sustained by confessions of the defendant alone, but must be supported by other proofs.

By the Civil Code of Practice of Kentucky of 1876, tit. 4, c. 2, art. 2, if a defendant has been absent from the State four months, and the plaintiff files an affidavit stating in what country the defendant resides or may be found and the name of the place wherein a post-office is kept nearest to the place where the defendant resides or may be found, the clerk may make an order warning the defendant to defend the action within sixty days; and shall at the same time appoint, as attorney for the defendant, a regular practising attorney of the court, whose duty it shall be to make diligent efforts to inform the defendant by mail concerning the pendency and nature of the action against him, and to report to the court the result of his efforts; and a defendant against whom a warning order is made, and for whom an attorney is appointed, is deemed to have been constructively summoned on the thirtieth day thereafter, and the action may proceed accordingly.

In accordance with these statutes, on December 28, 1892, the husband filed in a proper court of Kentucky a petition, under oath, for a divorce from the bond of matrimony, alleging his wife's abandonment of him ever since October, 1891, and that she had been absent from the State for more than four months, and might be found at Clinton in the State of New York, and that in Clinton was kept the postoffice nearest the place where she might be found; and the clerk entered a warning order, and appointed an attorney at law for the defendant. On January 5, 1893, that attorney wrote to the wife at Clinton, fully advising her of the object of the petition for divorce, and enclosing a copy thereof, in a letter addressed to her by mail at that place, and having printed on the envelope a direction to return it to him, if not delivered within ten days. On February 6, 1893, the attorney, not having received that letter again, or any answer from the defendant, or in her behalf, made his report to the court. And on March 14, 1893, the court, after taking evidence, including an agreement made by the parties in Kentucky, October 10, 1891, as to the domicil, custody and support of their child, granted to the husband an absolute divorce for his wife's abandonment of him.

There can be no doubt that this decree was by law and usage entitled to full faith and credit as an absolute decree of divorce in the State of Kentucky. The Court of Appeals of that State has held that, under its statutes, a wife residing in the State was entitled to obtain a decree of divorce against a husband who had left the State, or who had never been within it; and Chief Justice Robertson said: "It would be a reproach to our legislation if a faithless husband in Kentucky could, by leaving the State, deprive his abandoned wife of a power of obtaining a divorce at home." *Rhyms* v. *Rhyms*, (1870) 7 Bush, 316; *Perzel* v. *Perzel*, (1891) 91 Kentucky, 634. That court has recognized that the regulation of divorce belongs to the legislature of the domicil of the parties. *Maguire* v. *Maguire*, (1838) 7 Dana, 181, 185-187. And the same court, where husband and wife have lived together in

Kentucky, and she abandoned him, and he became a *bona fide* citizen of Indiana, held that a divorce from the bonds of matrimony, obtained by him against the wife in that State, by proceedings on constructive service, and according to the laws of that State, determined the status of the parties in Kentucky. *Hawkins* v. *Ragsdale,* (1882) 80 Kentucky, 353.

There is a weight of authority in accord with the views maintained by the Court of Appeals of Kentucky, although there are some decisions of learned courts to the contrary.

The purpose and effect of a decree of divorce from the bond of matrimony, by a court of competent jurisdiction, are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law. When the law provides, in the nature of a penalty, that the guilty party shall not marry again, that party, as well as the other, is still absolutely freed from the bond of the former marriage.

The rule as to the notice necessary to give full effect to a decree of divorce is different from that which is required in suits *in personam.*

In *Pennoyer* v. *Neff,* (1877) 95 U. S. 714, 734, this court, speaking by Mr. Justice Field, while deciding that a judgment of a state court on a debt could not be supported without personal service on the defendant within the State or his appearance in the cause, took occasion to say: "To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which the proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties, guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would therefore fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicil in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. 2 Bishop on Marriage and Divorce, § 156."

In *Cheeley* v. *Clayton*, (1884) 110 U. S. 701, which involved the validity of a decree of divorce, obtained in Colorado by a husband domiciled there, against his wife for unjustifiably refusing to live with him, this court said: "The courts of the State of the domicil of the parties doubtless have jurisdiction to decree a divorce in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage, or to that of the commission of the offence for which the divorce is granted; and a divorce so obtained is valid everywhere. Story, Conflict of Laws, § 230*a*; *Cheever* v. *Wilson*, 9 Wall. 108; *Harvey* v. *Farnie*, 8 App. Cas. 43. If a wife is living apart from her husband without sufficient cause, his domicil is in law her domicil; and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicil, after reasonable notice to her, either by personal service or by publication in accordance with its laws, is valid, although she never in fact resided in that State. *Burlen* v. *Shannon*, 115 Mass. 438; *Hunt* v. *Hunt*, 72 N. Y. 218. But in order to make the divorce valid, either in the State in which it is granted or in another State, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first State requires." 110 U. S. 705. In that case the decree of divorce was held void, because the notice required by the laws of the State had not been given; and the finding of the court below that the wife, at the time of the proceedings for divorce, was a citizen and resident of the State of Illinois, was given no weight, because, as this court said, it was hard to see how, if she unjustifiably refused to live with her husband in Colorado, she could lawfully acquire in his lifetime a separate domicil in another State; or how, if the Colorado court had jurisdiction to render the decree of divorce, and did render it upon the ground of her unlawful absence from him, the finding of the court below could consist with the fact so adjudged in the decree of divorce. 110 U. S. 709.

In *Harding* v. *Alden,* (1832) 9 Greenl. 140, the husband and wife lived together in Maine. He deserted her, and took up a residence in North Carolina, and there married and lived with another woman. The first wife then moved to and resided in Providence, Rhode Island, and there filed a libel in the Supreme Judicial Court for an absolute divorce against him for his desertion and adultery; and the court, after service of a citation on him, and two continuances of the cause, decreed a divorce as prayed for. The husband was never an inhabitant of Rhode Island. The wife afterwards married another man. The Supreme Judicial Court of Maine, in an opinion delivered by Mr. Justice Weston, held that the divorce in Rhode Island dissolved the bond of marriage between the parties; and said: "If we refuse to give full faith and credit to the decree of the Supreme Judicial Court of Rhode Island, because the party libelled had his domicil in another State, and was not within their jurisdiction, we refuse to accord to the decrees of that court the efficacy we claim for our own, when liable to the same objection. In the case before us, it is agreed that the party injured was at the time an inhabitant of Rhode Island, residing in Providence, and this fact is recited in the decree. It appears that by order of the court a citation was served upon the defendant in person; and that a continuance was twice granted, to give him an opportunity to appear in defence. This shows a due regard to that principle of justice, which gives to the party accused the right to be heard. The decree was rendered by the highest judicial tribunal in that State. As it belongs to that tribunal to declare, authoritatively and definitely, what the law of the State is, we are bound to infer that by that law the bonds of matrimony, previously existing between the libellant and her former husband, were thereby dissolved; and that such is the effect of the decree within the State of Rhode Island." 9 Greenl. 148. "There would be great inconvenience in holding that a divorce decreed in the State where the injured party resided might not be held valid through the Union, where the right of citizenship is common, where the party accused had established his domicil in another State, and there committed adultery. And this is the only objection to the efficacy of the decree in question; it being insisted that the court had no jurisdiction over the absent party. As has been before intimated, it would apply with equal force to many divorces decreed in this State. It would require that the wife, abandoned and dishonored, should seek the new domicil of the guilty husband, *animo manendi,* before she could claim the benefit of the law to be relieved from his control. In giving effect here to the divorce decreed in Rhode Island, we would wish to be understood, that the ground upon which we place our decision is limited to the dissolution of the marriage. In the libel, alimony was prayed for; and certain personal property, then in the possession of the wife, was decreed to her. Had the court awarded her a gross sum, or a weekly or an annual allowance, to be paid by the husband, and the courts of this or any other State had been resorted to to enforce it, a different question would be presented." 9 Greenl. 151.

Chancellor Kent, in his Commentaries, says of that case that it was there held "that a decree of divorce did not fall within the rule that a judgment rendered against one not within the State, nor bound by its laws, nor amendable to its jurisdiction, was not entitled to credit against the defendant in another State; and that divorces pronounced according to the law of one jurisdiction, and the new relations thereupon formed, ought to be recognized, in the absence of all fraud, as operative and binding everywhere, *so far as related to the dissolution of the marriage,* though not as to other parts of the decree, such as an order for the payment of money by the husband." And the Chancellor adds, "This is an important and valuable decision." 2 Kent Com. 110, note.

In *Ditson* v. *Ditson,* (1856) 4 Rhode Island, 87, (of which Judge Cooley, in his Treatise on Constitutional Limitations, 403, note, says there is no case in the books more full and satisfactory upon the whole subject of jurisdiction in divorce suits,) the Supreme Court of Rhode Island, in an elaborate opinion by Chief Justice Ames, affirmed its jurisdiction, upon constructive notice by publication, to grant a divorce to a wife domiciled in Rhode Island against a husband who had never been in Rhode Island, and whose place of residence was unknown; and said: "It is obvious that marriage, as a domestic relation, emerged from the contract which created it, is known and recognized as such throughout the civilized world; that it gives rights and imposes duties and restrictions upon the parties to it, affecting their social and moral condition, of the measure of which every civilized State, and certainly every State of this Union, is the sole judge so far as its own citizens or subjects are concerned, and should be so deemed by other civilized, and especially sister States; that a State cannot be deprived, directly or indirectly, of its sovereign power to regulate the status of its own domiciled subjects and citizens, by the fact that the subjects and citizens of other States, as related to them, are interested in that status; and in such a matter has a right, under the general law, judicially to deal with and modify or dissolve this relation, binding both parties to it by the decree, by virtue of its inherent power over its own citizens and subjects, and to enable it to answer their obligatory demands for justice; and finally, that in the exercise of this judicial power, and in order to the validity of a decree of divorce, whether *a mensa et thoro* or *a vinculo matrimonii,* the general law does not deprive a State of its proper jurisdiction over the condition of its own citizens, because non-residents, foreigners or domiciled inhabitants of other States have not or will not become, and cannot be made to become, personally subject to the jurisdiction of its courts; but upon the most familiar principles, and as illustrated by the most familiar analogies of general law, its courts may and can act conclusively in such a matter upon the rights and interests of such persons, giving to them such notice, actual or constructive, as the nature of the case admits of, and the practice of courts in similar cases sanctions." 4 Rhode Island, 105, 106.

The statutes of Massachusetts provided as follows: "When an inhabitant of this State goes into another State or country to obtain a divorce for any cause occurring here, and whilst the parties resided here, or for any cause which would not authorize a divorce by the laws of this State, a divorce so obtained shall be of no force or effect in this State. In all other cases, a divorce decreed in any other State or country according to the laws thereof, by a court having jurisdiction of the cause and both the parties, shall be valid and effectual in this State." That provision made no change in the law, but, in the words of the Commissioners upon whose advice it was first enacted, "is founded on the rule established by the comity of all civilized nations; and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be." Gen. Stat. of 1860, c. 107, §§ 54, 55; Rev. Stat. of 1836, c. 76, §§ 39, 40, and note of Commissioners; *Ross* v. *Ross,* 129 Mass. 243, 248.

In *Hood* v. *Hood,* (1865) 11 Allen, 196, the husband and wife, after living together in Massachusetts, removed to Illinois, and there lived together; the wife, "under circumstances as to which there was no evidence," and afterwards the husband, came back to Massachusetts, and, while they were living there in his brother-in-law's house for a few weeks, he signed an agreement, reciting that they had separated, and promising to pay her a certain weekly sum so long as she should remain single. She continued to reside in Massachusetts; and he obtained in Illinois a decree of divorce from her for her desertion, upon such notice as the laws of Illinois authorized in the case of an absent defendant. It was held by the Supreme Judicial Court of Massachusetts, in an opinion delivered by Mr. Justice Hoar, that both parties had their domicil in Illinois, and were subject to the jurisdiction of its courts; and that the fact of desertion by the wife was conclusively settled between the parties by the decree in Illinois, and it was not competent for the wife to contradict it on a libel afterwards filed by her in Massachusetts; and her libel was dismissed. And in *Hood* v. *Hood,* (1872) 110 Mass. 463, it appearing that such dismissal was upon the ground of the validity of the previous decree of divorce in Illinois, it was adjudged that that decree could not be impeached by the wife in a writ of dower by her against third persons, the court saying: "The decree in favor of her husband, dismissing her libel, was then forever conclusive against her, as between themselves. It severed the relation between them; or rather estopped her from averring anything to the contrary of the decree in Illinois which purported to sever that relation. The general rule, however, in regard to estoppels of record, is that they are good only between the parties of record and their privies. They cannot be set up in collateral proceedings between one of those parties and third persons. But the effect of the judgment in this case was to determine the status of the demandant. So far as it did that, it is a judgment that is operative and conclusive as to all the world."

The like view has been affirmed by courts of other States. *Thompson* v. *State,* (1856) 28 Alabama, 13; *Leith* v. *Leith,*

(1859) 39 N. H. 20, 39-43; *Shafer* v. *Bushnell,* (1869) 24 Wisconsin, 372; *Gould* v. *Crow,* (1874) 57 Missouri, 200; *Van Orsdal* v. *Van Orsdal,* (1885) 67 Iowa, 35; *Smith* v. *Smith,* (1891) 43 La. Ann. 1140; *In re James,* (1893) 99 California, 374; *Dunham* v. *Dunham,* (1896) 162 Illinois, 589, 607-610.

In *Shaw* v. *Shaw,* (1867) 98 Mass. 158, the husband and wife, domiciled in Massachusetts, left the State to take up their residence in Colorado. In Pennsylvania, on the journey, he treated her with extreme curelty, and she left him and returned to Massachusetts, and continued to reside there. It was held that while they were in Pennsylvania the domicil of both parties remained in Massachusetts, and that the wife might maintain a libel in Massachusetts for the cause occurring in Pennsylvania, although the husband before it occurred had left Massachusetts with the intention of never returning, and never did in fact return, and therefore no notice was or could be served upon him in Massachusetts.

In a very recent case, the Court of Errors of New Jersey maintained the validity of a divorce obtained in the State of Utah by a husband, having his *bona fide* domicil there, against a wife whose domicil was in New Jersey, after publication of the process and complaint in accordance with the statutes of Utah, and personal service upon the wife in New Jersey in time to enable her to make defence, if she wished to do so. Mr. Justice Gummere, speaking for the Court of Errors, said that, at least, "interstate comity requires that a decree of divorce, pronounced by a court of the State in which the complainant is domiciled, and which has jurisdiction of the subject-matter of the suit, shall, in the absence of fraud, be given full force and effect within the jurisdiction of a sister State, notwithstanding that the defendant does not reside within the jurisdiction of the court which pronounced the decree, and has not been served with process therein; provided that a substituted service has been made in accordance with the provisions of the statute of that State, and that actual notice of the pendency of the suit has been given to the defendant, and a reasonable opportunity afforded to put in a defence thereto; and provided, further, that the ground upon which the decree rests is one which the public policy of the State in which it is sought to be enforced recognizes as a sufficient cause for divorce." *Felt* v. *Felt,* (1899) 14 Dickinson (59 N. J. Eq.).

In New York, North Carolina and South Carolina, the opposite view has prevailed, either upon the ground that the rule as to notice is the same in suits for divorce as in ordinary suits *in personam*, or upon the ground that, in the absence of actual notice or appearance, the decree, while it may release the libellant, cannot release the libellee, from the bond of matrimony. *People* v. *Baker*, (1879) 76 N. Y. 78; *O'Dea* v. *O'Dea*, (1885) 101 N. Y. 23; *In re Kimball*, (1898) 155 N. Y. 62; *Irby* v. *Wilson*, (1837) 1 Dev. & Bat. Eq. 568; *McCreery* v. *Davis*, (1894) 44 So. Car. 195.

In *People* v. *Baker*, 76 N. Y. 78, upon which the subsequent decisions in New York are based, the defendant was married to a woman in the State of Ohio; they afterwards lived together in the State of New York; the wife, upon notice by publication, and without personal appearance of the husband, he being in New York, obtained a decree of divorce against him in Ohio; and he afterwards married another woman in New York, and was convicted of bigamy there. The conviction was affirmed by the Court of Appeals, without a suggestion that the first wife was not domiciled in Ohio at the time of the divorce, but stating the question in the case to be: "Can a court, in another State, adjudge to be dissolved and at an end the matrimonial relation of a citizen of this State, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that State?" The court admitted that "if one party to a proceeding is domiciled in a State, the status of that party, as affected by the matrimonial relation, may be adjudged upon and confirmed or changed, in accordance with the laws of that State;" but held that, without personal appearance or actual notice, the decree could not affect the matrimonial relation of the defendant in another State. The court recognized that the law was settled otherwise in some States, and said: "It remains for the Supreme Court of the United States, as the final arbiter, to determine how far a judgment rendered in such a case, upon such substituted service of process, shall be operative without the territorial jurisdicion of the tribunal giving it."

The authorities above cited show the wide diversity of opinion existing upon this important subject, and admonish us to confine our decisions to the exact case before us.

This case does not involve the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. In this case, the divorce in Kentucky was by the court of the State which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky.

The husband always had his domicil in Kentucky, and the matrimonial domicil of the parties was in Kentucky. On December 28, 1892, the husband filed his petition for a divorce in the court of appropriate jurisdiction in Kentucky, alleging an abandonment of him by the wife in Kentucky, and a continuance of that abandonment for a year, which was a cause of divorce by the laws of Kentucky. His petition truly stated, upon oath, as required by the statutes of Kentucky, that the wife might be found at Clinton in the State of New York, and that at Clinton was the post-office nearest the place where she might be found. As required by the statutes of Kentucky, the clerk thereupon entered a warning order to the wife to appear in sixty days, and appointed an attorney at law to represent her. The attorney, on January 5, 1893, wrote to the wife at Clinton, fully advising her of the object of the petition for divorce and enclosing a copy thereof, in a letter addressed to her by mail at Clinton, and having printed on the envelope a direction to return it to him, if not delivered in ten days. There is a presumption of fact, though not of law, that a letter, put into the post-office and properly addressed, is received by the person to whom it is addressed. *Rosenthal* v. *Walker,* (1884) 111 U. S. 185. On February 6, 1893, the attorney, having received no answer, made his report to the court. And on March 14, 1893, the court, after taking evidence, granted the husband an absolute decree of divorce for his wife's abandonment of him.

The court of New York has indeed found that the wife "was not personally served with process within the State of Kentucky, or at all." It may be doubted whether this negatives her having received, or had knowledge of, the letter sent to her by the attorney in Kentucky, January 5, 1893, six days before she began her suit in New York. But assuming that it does, the question in this case is not whether she had actual notice of the proceedings for divorce, but whether such reasonable steps had been taken to give her notice, as to bind her by the decree in the State of the domicil.

The court in New York found that the wife left the husband and went to Clinton with the purpose and intention of not returning to the State of Kentucky, but of permanently residing in the State of New York; and that this purpose and intention were understood by the husband at the time, and were contemplated and evidenced by the agreement executed by the parties in Kentucky, October 10, 1891. But that agreement was among the proofs submitted to the court in Kentucky, and may well have been considered by that court, as the preamble to the agreement states, as simply intended to provide for the interest of their child, recognizing that the parties had ceased to live together as husband and wife, but "without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequence which may follow, or right which may arise to either party if such status shall continue." The agreement contains no mention of the domicil of either husband or wife, but declares that the domicil of the child is to be the State of Kentucky, and is taken up with providing that its custody shall be half of each year with the mother, and the other half with the paternal grandmother, and with providing for the support and custody of the child, in various future contingencies, including the divorce and second marriage of the husband or of the wife.

We are of opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky, and were actually made, to give the wife actual notice of the suit in Kentucky, as to make the decree of the court there, granting a divorce upon the ground that she had abandoned her husband, as binding on her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit. Binding her to that full extent, it established, beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment.

To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause alleged, if it actually existed. The wife not being within the State of Kentucky, if constructive notice, with all the precautions prescribed by the statutes of that State, were insufficient to bind her by a decree dissolving the bond of matrimony, the husband could only get a divorce by suing in the State in which she was found; and by the very fact of suing her there he would admit that she had acquired a separate domicil, (which he denied,) and would disprove his own ground of action that she had abandoned him in Kentucky.

The result is that the courts of New York have not given to the Kentucky decree of divorce the faith and credit which it had by law in Kentucky, and that therefore their

*Judgments must be reversed, and the case remanded to the Supreme Court of New York for further proceedings not inconsistent with this opinion.*

MR. JUSTICE PECKHAM and THE CHIEF JUSTICE, DISSENTING.

MR. JUSTICE PECKHAM, with whom THE CHIEF JUSTICE concurred, dissenting.

I think this case was rightly decided by the Court of Appeals of New York, and I therefore dissent from the judgment and the opinion of the court herein.

I think if the husband had, at his domicil in Kentucky, been guilty of such misconduct and cruelty towards his wife as entitled her to a divorce, she had a legal right for that reason to leave him and to acquire a separate domicil, even in another State. If, under such circumstances, she did leave him, and did acquire a separate domicil in New York State, the Kentucky court did not obtain jurisdiction over her as an absent defendant, by publication of process or sending a copy thereof through the mail to her address in New York.

It has long been held that the wife upon such facts could acquire a separate domicil. In *Cheever* v. *Wilson,* 9 Wall. 108, 123, 124, it was so decided, and the case of *Ditson* v. *Ditson,* 4 R. I. 87, was therein cited with approval upon that proposition. It was said in the Rhode Island case that "Although as a general doctrine the domicil of the husband is by law that of the wife, yet when he commits an offence, or is guilty of such dereliction of duty in the relation as entitled her to have the marriage either partially or totally dissolved, she not only may but *must*, to avoid condonation, establish a separate domicil of her own. This she may establish, nay, when deserted, or compelled to leave her husband, necessity frequently compels her to establish it in a different judicial or state jurisdiction than that of her husband, according to the residence of her family or friends. Under such circumstances she gains, and is entitled to gain, for the purposes of jurisdiction, a domicil of her own." This is also held in *Hunt* v. *Hunt*, 72 N. Y., 217, where many of the authorities are collected.

By the statute of New York in force at the time the parties were therein married, the court had jurisdiction to grant a limited divorce on the complaint of a married woman, where the marriage had been solemnized in the State and the wife was an actual resident therein at the time of exhibiting her complaint. By virtue of this statute and of the wife's residence in New York at the time of exhibiting her complaint (if such residence were legally acquired, as already stated,) the court in that State had jurisdiction of an action for divorce against her husband, and jurisdiction over the husband was complete when he appeared in the suit. Having the right to acquire a residence in the State, it was open to her to prove in the divorce case which she instituted in New York the facts which justified her leaving her husband's home in Kentucky and in acquiring a separate domicil in New York, and the decision of the Kentucky court, that it had jurisdiction over her in her husband's suit, was not conclusive against her upon that question. The New York court entered upon the inquiry and found the fact that she was justified by her husband's acts in leaving his home and in acquiring a new domicil for herself, and that the Kentucky court therefore obtained no jurisdiction over her. It also found the facts necessary to warrant it in granting to her a divorce under the laws of New York, and it granted one accordingly. This I think the New York court had jurisdiction to do, and it did not thereby refuse the constitutional full faith to the Kentucky judgment.

That a husband can drive his wife from his home by conduct which entitles her to a divorce, and thus force her to find another domicil, and then commence proceedings in a court of his own domicil, for a divorce, which court obtains jurisdiction over her only by a service of process in the State of her new domicil, through the mail, and that on such service he can obtain a judgment of divorce which shall be conclusive against her in her action in the court of her own domicil, seems to me to be at war with sound principle and the adjudged cases. The doctrine of status, even as announced in the opinion of the court, does not reach the case of a husband by his misconduct rendering it necessary for the wife to leave him. I therefore dissent.

I am authorized to state that the CHIEF JUSTICE concurs in this dissent.

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## HADDOCK *v.* HADDOCK.

For the official reference, see the second page of this Appendix.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 119. Argued December 11, 1905.—Decided April 12, 1906.

The husband and wife being domiciled in New York, the husband left the wife, acquired, in good faith, after a lapse of years, a domicil in Connecticut, and obtained in that State, and in accordance with its laws, a judgment of divorce based on constructive, and not actual, service of process, on the wife, who meanwhile remained domiciled in New York and never appeared in the action. The wife subsequently sued for divorce in New York and obtained personal service in that State on the husband who pleaded the Connecticut judgment. *Held,*

Without questioning the power of the State of Connecticut to enforce the decree within its own borders, and without intimating any doubt that the State of New York might give it such degree of efficacy that it might be entitled to in view of the public policy of the State, that the Connecticut decree, rendered as it was without being based on personal service of the process on, and therefore without personal jurisdiction of the court over, the wife, was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause of the Federal Constitution.

A suit for divorce brought in a State other than that of domicil of matrimony against a wife who is still domiciled therein is not a proceeding *in rem* justifying the court to enter a decree as to the *res*, or marriage relation, entitled to be enforced outside of the territorial jurisdiction of the court.

Questions concerning alleged fraud in contracting a marriage and laches on the part of one of the parties in bringing an action for divorce are matters solely of state cognizance and may not even be

**allowed to indirectly influence this court in determining the Federal question which is involved.**

The States at the time of the adoption of the Constitution possessed full power over the subject of marriage and divorce and the Constitution delegated no authority to the Central Government in regard thereto, and the destruction of the power of the States over the dissolution of marriage as to their own citizens cannot be brought about by the operation of the full faith and credit clause of the Constitution of the United States.

Previous decisions of this court hold in regard to the full faith and credit to be given by States to the judicial decrees of other States that:

The requirement is not that some, but that full, faith and credit, equal to that to which it is entitled in the State where rendered, shall be given to a judicial decree of another State. *Harding* v. *Harding*, 198 U. S. 317.

A personal judgment against a non-resident—not a proceeding *in rem*—based merely upon constructive service and therefore jurisdiction not being acquired over the defendant's person may not be enforced in another State under the full faith and credit clause. *Pennoyer* v. *Neff*, 95 U. S. 714.

All governments possess inherent power over the marriage relation, its formation and dissolution, as regards their own citizens, and where a court or legislature of a State has acted conformably with its own laws concerning the marriage tie as to a citizen of that State, its action is binding in that State as to that citizen, and its validity under the due process clause of the Constitution may not therein be questioned. *Maynard* v. *Hill*, 125 U. S. 190.

As a corollary to the power of the State, irrespective of any extraterritorial effect, any other sovereign may, under the principles of comity give to such a decree the efficacy which its own conception of duty and public policy may justify.

Where a husband and wife are domiciled in a State jurisdiction exists in that State, for good cause to enter a decree of divorce, entitled to enforcement in another State under the full faith and credit clause; and where a *bona fide* domicil has been acquired in a State by either husband or wife, a decree of divorce obtained by either in a court having personal jurisdiction of the other is likewise entitled to be so enforced in other States. *Cheever* v. *Wilson*, 9 Wall. 108.

Where the domicil of a matrimony is in a particular State, and the husband abandoning the wife, wrongfully goes into another State in order to avoid his marital obligation, such other State does not become a new domicil of matrimony, nor the actual or constructive domicil of the wife. That continues in the original State until she actually acquires a new one. *Barber* v. *Barber*, 21 How. 582.

Where the domicil of the husband is in a particular State, which is also the domicil of matrimony, the courts of that State may, in virtue of the wife's duty to be at the matrimonial domicil, disregard her unjustifiable absence therefrom and treat her as having her domicil therein for the purpose of dissolving the marriage and render a judgment to that effect entitled to recognition in all other States under the full faith and credit clause of the Constitution. *Atherton* v. *Atherton*, 181 U. S. 155.

The facts, which involved the full faith and credit to be given by the courts of the State of New York to a decree of divorce, obtained in Connecticut by the husband, formerly a resident of New York, from his wife still residing in New York, based on substituted service of the summons, are stated in the opinion.

*Mr. Abram J. Rose*, with whom *Mr. William H. Willits* and *Mr. Alfred C. Pettè* were on the brief, for plaintiff in error.

*Mr. Henry Willis Smith*, with whom *Mr. William T. Tomlinson* and *Mr. William W. Smith* were on the brief, for defendant in error.

Mr. Justice White delivered the opinion of the court.

### Opinion of the Court.

The plaintiff in error will be called the husband and the defendant in error the wife.

The wife, a resident of the State of New York, sued the husband in that State in 1899, and there obtained personal service upon him. The complaint charged that the parties had been married in New York in 1868, where they both resided and where the wife continued to reside, and it was averred that the husband, immediately following the marriage, abandoned the wife, and thereafter failed to support her, and that he was the owner of property. A decree of separation from bed and board and for alimony was prayed. The answer admitted the marriage, but averred that its celebration was procured by the fraud of the wife, and that immediately after the marriage the parties had separated by mutual consent. It was also alleged that during the long period between the celebration and the bringing of this action the wife had in no manner asserted her rights and was barred by her laches from doing so. Besides, the answer alleged that the husband had, in 1881, obtained in a court of the State of Connecticut a divorce which was conclusive. At the trial before a referee the judgment roll in the suit for divorce in Connecticut was offered by the husband and was objected to, first, because the Connecticut court had not obtained jurisdiction over the person of the defendant wife, as the notice of the pendency of the petition was by publication and she had not appeared in the action; and, second, because the ground upon which the divorce was granted, viz., desertion by the wife, was false. The referee sustained the objections and an exception was noted. The judgment roll in question was then marked for identification and forms a part of the record before us.

Having thus excluded the proceedings in the Connecticut court, the referee found that the parties were married in New York in 1868, that the wife was a resident of the State of New York, that after the marriage the parties never lived together, and shortly thereafter that the husband without justifiable cause abandoned the wife, and has since neglected to provide for her. The legal conclusion was that the wife was entitled to a separation from bed and board and alimony in the sum of $780 a year from the date of the judgment. The action of the referee was sustained by the Supreme Court of the State of New York, and a judgment for separation and alimony was entered in favor of the wife. This judgment was affirmed by the Court of Appeals. As by the law of the State of New York, after the affirmance by the Court of Appeals, the record was remitted to the Supreme Court, this writ of error to that court was prosecuted.

The Federal question is, Did the court below violate the Constitution of the United States by refusing to give to the decree of divorce rendered in the State of Connecticut the faith and credit to which it was entitled?

As the averments concerning the alleged fraud in contracting the marriage and the subsequent laches of the wife are solely matters of state cognizance, we may not allow them to even indirectly influence our judgment upon the Federal question to which we are confined, and we, therefore, put these subjects entirely out of view. Moreover, as, for the purpose of the Federal issue, we are concerned not with the mere form of proceeding by which the Federal right, if any, was denied, but alone have power to decide whether such right was denied, we do not inquire whether the New York court should preferably have admitted the record of the Connecticut divorce suit, and, after so admitting it, determine what effect it would give to it instead of excluding the record and thus refusing to give effect to the judgment. In order to decide whether the refusal of the court to admit in evidence the Connecticut decree denied to that decree the efficacy to which it was entitled under the full faith and credit clause, we must first examine the judgment roll of the Connecticut cause in order to fix the precise circumstances under which the decree in that cause was rendered.

Without going into detail, it suffices to say that on the face of the Connecticut record it appeared that the husband, alleging that he had acquired a domicil in Connecticut, sued the wife in that State as a person whose residence was unknown, but whose last known place of residence was in the State of New York, at a place stated, and charged desertion by the wife and fraud on her part in procuring the marriage; and, further, it is shown that no service was made upon the wife except by publication and by mailing a copy of the petition to her at her last known place of residence in the State of New York.

With the object of confining our attention to the real question arising from this condition of the Connecticut record, we state at the outset certain legal propositions irrevocably concluded by previous decisions of this court, and which are required to be borne in mind in analyzing the ultimate issue to be decided.

First. The requirement of the Constitution is not that some, but that full, faith and credit shall be given by States to the judicial decrees of other States. That is to say, where a decree rendered in one State is embraced by the full faith and credit clause that constitutional provision commands that the other States shall give to the decree the force and effect to which it was entitled in the State where rendered. *Harding* v. *Harding,* 198 U. S. 317.

Second. Where a personal judgment has been rendered in the courts of a State against a non-resident merely upon constructive service, and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another State in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is by operation of the due process clause of the Fourteenth Amendment void as against the non-resident, even in the State where rendered, and, therefore, such non-resident in virtue of rights granted by the Constitution of the United States may successfully resist even in the State where rendered, the enforcement of such a judgment. *Pennoyer* v. *Neff*, 95 U. S. 714. The facts in that case were these: Neff, who was a resident of a State other than Oregon, owned a tract of land in Oregon. Mitchell, a resident of Oregon, brought a suit in a court of that State upon a money demand against Neff. The Oregon statutes required, in the case of personal action against a non-resident, a publication of notice, calling upon the defendant to appear and defend, and also required the mailing to such defendant at his last known place of residence of a copy of the summons and complaint. Upon affidavit of the absence of Neff, and that he resided in the State of California, the exact place being unknown, the publication required by the statute was ordered and made, and judgment by default was entered against Neff. Upon this judgment execution was issued and real estate of Neff was sold and was ultimately acquired by Pennoyer. Neff sued in the Circuit Court of the United States for the District of Oregon to recover the property, and the question presented was the validity in Oregon of the judgment there rendered against Neff. After the most elaborate consideration it was expressly decided that the judgment rendered in Oregon under the circumstances stated was void for want of jurisdiction and was repugnant to the due process clause of the Constitution of the United States. The ruling was based on the proposition that a court of one State could not acquire jurisdiction to render a personal judgment against a non-resident who did not appear by the mere publication of a summons, and that the want of power to acquire such jurisdiction by publication could not be aided by the fact that under the statutes of the State in which the suit against the non-resident was brought the sending of a copy of the summons and complaint to the post-office address in another State of the defendant was required and complied with. The court said (p. 727):

"Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability."

And the doctrine thus stated but expressed a general principle expounded in previous decisions. *Bischoff* v. *Wethered*, 9 Wall. 812. In that case, speaking of a money judgment recovered in the Common Pleas of Westminister Hall, England, upon personal notice served in the city of Baltimore, Mr. Justice Bradley, speaking for the court, said (p. 814):

"It is enough to say [of this proceeding] that it was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law against property of the defendant there situate, it can have no validity here, even of a *prima facie* character. It is simply null."

Third. The principles, however, stated in the previous proposition are controlling only as to judgments *in personam* and do not relate to proceedings *in rem*. That is to say, in consequence of the authority which government possesses over things within its borders there is jurisdiction in a court of a State by a proceeding *in rem*, after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although jurisdiction is not directly acquired over the person of the owner of the thing. *Pennoyer* v. *Neff*, *supra*.

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one State, conformably to the laws of such State, or the State through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that State, such action is binding in that State as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the State in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution. *Maynard* v. *Hill*, 125 U. S. 190. In that case the facts were these: Maynard was married in Vermont, and the husband and wife removed to Ohio, from whence Maynard left his wife and family and went to California. Subsequently he acquired a domicil in the Territory of Washington. Being there so domiciled, an act of the legislature of the Territory was passed granting a divorce to the husband. Maynard continued to reside in Washington, and there remarried and died. The children of the former wife, claiming in right of their mother, sued in a court of the Territory of Washington to recover real estate situated in the Territory, and one of the issues for decision was the validity of the legislative divorce granted to the father. The statute was assailed as invalid, on the ground that Mrs. Maynard had no notice and that she was not a resident of the Territory when the act was passed. From a decree of the Supreme Court of the Territory adverse to their claim the children brought the case to this court. The power of the territorial legislature, in the absence of restrictions in the organic act, to grant a divorce to a citizen of the Territory was, however, upheld, in view of the nature and extent of the authority which government possessed over the marriage relation. It was therefore decided that the courts of the Territory committed no error in giving effect within the Territory to the divorce in question. And as a corollary of the recognized power of a government thus to deal with its own citizen by a decree which would be operative within its own borders, irrespective of any extraterritorial efficacy, it follows that the right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conception of duty and public policy.

Fifth. It is no longer open to question that where husband and wife are domiciled in a State there exists jurisdiction in such State, for good cause, to enter a decree of divorce which will be entitled to enforcement in another State by virtue of the full faith and credit clause. It has, moreover, been decided that where a *bona fide* domicil has been acquired in a State by either of the parties to a marriage, and a suit is brought by the domiciled party in such State for a divorce, the courts of that State, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every State by the full faith and credit clause. *Cheever* v. *Wilson*, 9 Wall. 108.

Sixth. Where the domicil of matrimony was in a particular State, and the husband abandons his wife and goes into another State in order to avoid his marital obligations, such other State to which the husband has wrongfully fled does not, in the nature of things, become a new domicil of matrimony, and, therefore, is not to be treated as the actual or constructive domicil of the wife; hence, the place where the wife was domiciled when so abandoned constitutes her legal domicil until a new actual domicil be by her elsewhere acquired. This was clearly expressed in *Barber* v. *Barber,* 21 How. 582, where it was said (p. 595):

"The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicil and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicil hers. . . ."

And the same doctrine was expressly upheld in *Cheever* v. *Wilson, supra,* where the court said (9 Wall. 123):

"It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. The right springs from the necessity of its exercise, and endures as long as the necessity continues."

Seventh. So also it is settled that where the domicil of a husband is in a particular State, and that State is also the domicil of matrimony, the courts of such State having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having her domicil in the State of the matrimonial domicil for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other States by virtue of the full faith and credit clause. *Atherton* v. *Atherton,* 181 U. S. 155.

Coming to apply these settled propositions to the case before us three things are beyond dispute: *a.* In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the State of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that State. *b*. As New York was the domicil of the wife and the domicil of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicil of the wife continued in New York. *c*. As then there can be no question that the wife was not constructively present in Connecticut by virtue of a matrimonial domicil in that State, and was not there individually domiciled and did not appear in the divorce cause, and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicil of the wife within the State or as the result of personal service upon her within its borders.

These subjects being thus eliminated, the case reduces itself to this: Whether the Connecticut court, in virtue alone of the domicil of the husband in that State, had jurisdiction to render a decree against the wife under the circumstances stated, which was entitled to be enforced in other States in and by virtue of the full faith and credit clause of the Constitution. In other words, the final question is whether to enforce in another jurisdiction the Connecticut decree would not be to enforce in one State, a personal judgment rendered in another State against a defendant over whom the court of the State rendering the judgment had not acquired jurisdiction. Otherwise stated, the question is this: Is a proceeding for divorce of such an exceptional character as not to come within the rule, limiting the authority of a State to persons within its jurisdiction, but on the contrary, because of the power which government may exercise over the marriage relation, constitutes an exception to that rule, and is therefore embraced either within the letter or spirit of the doctrines stated in the third and fourth propositions?

Before reviewing the authorities relied on to establish that a divorce proceeding is of the exceptional nature indicated, we propose first to consider the reasons advanced to sustain the contention. In doing so, however, it must always be borne in mind that it is elementary that where the full faith and credit clause of the Constitution is invoked to compel the enforcement in one State of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry. And if there was no jurisdiction, either of the subject matter or of the person of the defendant, the courts of another State are not required, by virtue of the full faith and credit clause of the Constitution, to enforce such decree. *National Exchange Bank* v. *Wiley,* 195 U. S. 257, 269, and cases cited.

I. The wide scope of the authority which government possesses over the contract of marriage and its dissolution is the basis upon which it is argued that the domicil within one State of one party to the marriage gives to such a State jurisdiction to decree a dissolution of the marriage tie which will be obligatory in all the other States by force of the full faith and credit clause of the Constitution. But the deduction is destructive of the premise upon which it rests. This becomes clear when it is perceived that if one government, because of its authority over its own citizens has the right to dissolve the marriage tie as to the citizen of another jurisdiction, it must follow that no government possesses as to its own citizens, power over the marriage relation and its dissolution. For if it be that one government in virtue of its authority over marriage may dissolve the tie as to citizens of another government, other governments would have a similar power, and hence the right of every government as to its own citizens might be rendered nugatory by the exercise of the power which every other government possessed. To concretely illustrate: If the fact be that where persons are married in the State of New York either of the parties to the marriage may, in violation of the marital obligations, desert the other and go into the State of Connecticut, there acquiring a domicil, and procure a dissolution of the marriage which would be binding in the State of New York as to the party to the marriage there domiciled, it would follow that the power of the State of New York as to the dissolution of the marriage as to its domiciled citizen would be of no practical avail. And conversely the like result would follow if the marriage had been celebrated in Connecticut and desertion had been from that State to New York, and consequently the decree of divorce had been rendered in New York. Even a superficial analysis will make this clear. Under the rule contended for it would follow that the States whose laws were the most lax as to length of residence required for domicil, as to causes for divorce and of speed of procedure concerning divorce, would in effect dominate all the other States. In other words, any person who was married in one State and who wished to violate the marital obligations would be able, by following the lines of least resistence, to go into the State whose laws were the most lax, and there avail of them for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and public policy of the other States. Thus the argument comes necessarily to this, that to preserve the lawful authority of all the States over marriage it is essential to decide that all the States have such authority only at the sufferance of the other States. And the considerations just stated serve to dispose of the argument that the contention relied on finds support in the ruling made in *Maynard* v. *Hill*, referred to in the fourth proposition, which was at the outset stated. For in that case the sole question was the effect within the Territory of Washington of a legislative divorce granted in the Territory to a citizen thereof. The upholding of the divorce within the Territory was, therefore, but a recognition of the power of the territorial government, in virtue of its authority over marriage, to deal with a person domiciled within its jurisdiction. The case, therefore, did not concern the extraterritorial efficacy of the legislative divorce. In other words, whilst the ruling recognized the ample powers which government possesses over marriage as to one within its jurisdiction, it did not purport to hold that such ample powers might be exercised and enforced by virtue of the Constitution of the United States in another jurisdiction as to citizens of other States to whom the jurisdiction of the Territory did not extend.

The anomalous result which it is therefore apparent would arise from maintaining the proposition contended for is made more manifest by considering the instrument from which such result would be produced, that is, the full faith and credit clause of the Constitution. No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. No one, moreover, can deny that, prior to the adoption of the Constitution, the extent to which the States would recognize a divorce obtained in a foreign jurisdiction depended upon their conceptions of duty and comity. Besides, it must be conceded that the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce. Yet, if the proposition be maintained, it would follow that the destruction of the power of the States over the dissolution of marriage, as to their own citizens, would be brought about by the operation of the full faith and credit clause of the Constitution. That is to say, it would come to pass that, although the Constitution of the United States does not interfere with the authority of the States over marriage, nevertheless the full faith and credit clause of that instrument destroyed the authority of the States over the marriage relation. And as the Government of the United States has no delegated authority on the subject, that Government would be powerless to prevent the evil thus brought about by the full faith and credit clause. Thus neither the States nor the National Government would be able to exert that authority over the marriage tie possessed by every other civilized government. Yet more remarkable would be such result when it is borne in mind that, when the Constitution was adopted, nowhere, either in the mother country or on the continent of Europe, either in adjudged cases or in the treatises of authoratative writers, had the theory ever been upheld or been taught or even suggested that one government, solely because of the domicil within its borders of one of the parties to a marriage, had authority, without the actual or constructive presence of the other, to exert its authority by a dissolution of the marriage tie, which exertion of power it would be the duty of other States to respect as to those subject to their jurisdiction.

II. It is urged that the suit for divorce was a proceeding *in rem*, and, therefore, the Connecticut court had complete jurisdiction to enter a decree as to the *res*, entitled to be enforced in the State of New York. But here again the argument is contradictory. It rests upon the theory that jurisdiction in Connecticut depended upon the domicil of the person there suing and yet attributes to the decree resting upon the domicil of one of the parties alone a force and effect based upon the theory that a thing within the jurisdiction of Connecticut was the subject matter of the controversy. But putting this contradiction aside, what, may we ask, was the *res* in Connecticut? Certainly it cannot in reason be said that it was the cause of action or the mere presence of the person of the plaintiff within the jurisdiction. The only possible theory then upon which the proposition proceeds must be that the *res* in Connecticut, from which the jurisdiction is assumed to have arisen, was the marriage relation. But as the marriage was celebrated in New York between citizens of that State, it must be admitted, under the hypothesis stated, that before the husband deserted the wife in New York, the *res* was in New York and not in Connecticut. As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicil in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut. Conceding, however, that he took with him to Connecticut so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the status of the wife. From any point of view, then, under the proposition referred to, if the marriage relation be treated as the *res*, it follows that it was divisible, and therefore there was a *res* in the State of New York and one in the State of Connecticut. Thus considered, it is clear that the power of one State did not extend to affecting the thing situated in another State. As illustrating this conception, we notice the case of *Mississippi & Missouri R. R. Co.* v. *Ward,* 2 Black, 485. The facts in that case were these: A bill was filed in a District Court of the United States for the District of Iowa to abate a nuisance alleged to have been occasioned by a bridge across the Mississippi river dividing the States of Illinois and Iowa. Under the assumption that the nuisance was occasioned by the operation of the bridge on the Illinois side, the court, after pointing out that the United States Circuit Court for the District of Iowa exercised the same jurisdiction that a state court of Iowa could exercise and no more, said (p. 494):

"The District Court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the court's jurisdiction and powers of inquiry, and outside of the case."

Nor has the conclusive force of the view which we have stated been met by the suggestion that the *res* was indivisible, and therefore was wholly in Connecticut and wholly in New York, for this amounts but to saying that the same thing can be at one and the same time in different places. Further, the reasoning above expressed disposes of the contention that, as the suit in Connecticut involved the status of the husband, therefore the courts of that State had the power to determine the status of the non-resident wife by a decree which had obligatory force outside of the State of Connecticut. Here, again, the argument comes to this, that, because the State of Connecticut had jurisdiction to fix the status of one domiciled within its borders, that State also had the authority to oust the State of New York of the power to fix the status of a person who was undeniably subject to the jurisdiction of that State.

III. It is urged that whilst marriage is in one aspect a contract, it is nevertheless a contract in which society is deeply interested and, therefore, government must have the power to determine whether a marriage exists or to dissolve it, and hence the Connecticut court had jurisdiction of the relation and the right to dissolve it, not only as to its own citizen but as to a citizen of New York who was not subject to the jurisdiction of the State of Connecticut. The proposition involves in another form of statement the *non sequitur* which we have previously pointed out; that is, that, because government possesses power over marriage, therefore the existence of that power must be rendered unavailing.

Nor is the contention aided by the proposition that because it is impossible to conceive of the dissolution of the marriage as to one of the parties in one jurisdiction without at the same time saying that the marriage is dissolved as to both in every other jurisdiction, therefore the Connecticut decree should have obligatory effect in New York as to the citizen of that State. For, again, by a change of form of statement, the same contention which we have disposed of is reiterated. Besides, the proposition presupposes that, because in the exercise of its power over its own citizens, a State may determine to dissolve the marriage tie by a decree which is efficacious within its borders, therefore such decree is in all cases binding in every other jurisdiction. As we have pointed out at the outset, it does not follow that a State may not exert its power as to one within its jurisdiction simply because such exercise of authority may not be extended beyond its borders into the jurisdiction and authority of another State. The distinction was clearly pointed out in *Blackinton* v. *Blackinton,* 141 Massachusetts, 432. In that case the parties were married and lived in Massachusetts. The husband abandoned the wife without cause and became domiciled in New York. The wife remained at the matrimonial domicil in Massachusetts and instituted a proceeding to prohibit her husband from imposing any restraint upon her personal liberty and for separate maintenance. Service was made upon the husband in New York. The court, recognizing fully that under the circumstances disclosed the domicil of the husband was not the domicil of the wife, concluded that, under the statutes of Massachusetts, it had authority to grant the relief prayed, and was then brought to determine whether the decree ought to be made, in view of the fact that such decree might not have extraterritorial force. But this circumstance was held not to be controlling and the decree was awarded. The same doctrine was clearly expounded by the Privy Council, in an opinion delivered by Lord Watson, in the divorve case of *Le Mesurier* v. *Le Mesurier* (1895), A. C. 517, where it was said (p. 527):

"When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. . . . On the other hand, a decree of divorce *a vinculo,* pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extraterritorial authority."

IV. The contention that if th epower of one State to decree a dissolution of a marriage which would be compulsory upon the other States be limited to cases where both parties are subject to the jurisdiction, the right to obtain a divorce could be so hampered and restricted as to be in effect impossible of exercise, is but to insist that in order to favor the dissolution of marriage and to cause its permanency to depend upon the mere caprice or wrong of the parties, there should not be applied to the right to obtain a divorce those fundamental principles which safeguard the exercise of the simplest rights. In other words, the argument but reproduces the fallacy already exposed, which is, that one State must be endowed with the attribute of destroying the authority of all the others concerning the dissolution of marriage in order to render such dissolution easy of procurement. But even if the true and controlling principles be for a moment put aside and mere considerations of inconvenience be looked at, it would follow that the preponderance of inconvenience would be against the contention that a State should have the power to exert its authority concerning the dissolution of marriage as to those not amenable to its jurisdiction. By the application of that rule each State is given the power of overshadowing the authority of all the other States, thus causing the marriage tie to be less protected than any other civil obligation, and this to be accomplished by destroying individual rights without a hearing and by tribunals having no jurisdiction. Further, the admission that jurisdiction in the courts of one State over one party alone was the test of the right to dissolve the marriage tie as to the other party although domiciled in another State, would at once render such test impossible of general application. In other words, the test, if admitted, would destroy itself. This follows, since if that test were the rule, each party to the marriage in one State would have a right to acquire a domicil in a different State and there institute proceedings for divorce. It would hence necessarily arise that domicil would be no longer the determinative criterion, but the mere race of diligence between the parties in seeking different forums in other States or the celerity by which in such States judgments of divorce might be procured would have to be considered in order to decide which forum was controlling.

On the other hand, the denial of the power to enforce in another State a decree of divorce rendered against a person who was not subject to the jurisdiction of the State in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the States over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy but also to protect the individual rights of their citizens. It does not deprive a State of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction and does not debar other States from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity. It causes the full faith and credit clause of the Constitution to operate upon decrees of divorce in the respective States just as that clause operates upon other rights, that is, it compels all the States to recognize and enforce a judgment of divorce rendered in other States where both parties were subject to the jurisdiction of the State in which the decree was rendered, and it enables the States rendering such decrees to take into view for the purpose of the exercise of their authority the existence of a matrimonial domicil from which the presence of a party not physically present within the borders of a State may be constructively found to exist.

Having thus disposed of the reasoning advanced to sustain the assertion that the courts of the State of New York were bound by the full faith and credit clause to give full effect to the Connecticut decree, we are brought to consider the authorities relied upon to support that proposition.

Whilst the continental and English authorities are not alluded to in the argument, it may be well, in the most summary way, to refer to them as a means of illustrating the question for consideration. The extent of the power which independent sovereignties exercised over the dissolution of the marriage tie, as to their own citizens, gave rise, in the nature of things, to controversies concerning the extraterritorial effect to be given to a dissolution of such tie when made between citizens of one country by judicial tribunals of another country in which such citizens had become domiciled. We do not deem it essential, however, to consider the conflicting theories and divergent rules of public policy which were thus engendered. We are relieved of the necessity of entering upon such an inquiry, since it cannot be doubted that neither the practice nor the theories controlling in the countries on the continent lend the slightest sanction to the contention that a government, simply because one of the parties to a marriage was domiciled within its borders, where no matrimonial domicil ever existed, had power to render a decree dissolving a marriage which on principles of international law was entitled to obligatory extraterritorial effect as to the other party to the marriage, a citizen of another country. Wharton, Conf. Laws, 3d ed., v. 1, p. 441, sec. 209 and notes.

It cannot be doubted, also, that the courts of England decline to treat a foreign decree of divorce as having obligatory extraterritorial force when both parties to the marriage were not subject to the jurisdiction of the court which rendered the decree. *Shaw* v. *Gould,* L. R. 3 H. L. 55; *Harvey* v. *Farnie,* 8 App. Cas. 43. And, although it has been suggested in opinions of English judges treating of divorce questions that exceptional cases might arise which perhaps would justify a relaxation of the rigor of the presumption that the domicil of the husband was the domicil of the wife, per Lords Eldon and Redesdale, in *Tovey* v. *Lindsay,* 1 Dow, 133, 140; per Lord Westbury, in *Pitt* v. *Pitt,* 4 Macq. 627, 640; per Brett, L. J. in *Niboyet* v. *Niboyet,* 4 P. D. 1, 14; *Briggs* v. *Briggs,* 5 P. D. 163, 165; and per James and Cotton, L. JJ., in *Harvey* v. *Farnie,* 6 P. D. 47, 49, the courts England, in cases where the jurisdiction was dependent upon domicil, have enforced the presumption and treated the wife as being within the jurisdiction where the husband was legally domiciled. But this conception was not a departure from the principle uniformly maintained, that, internationally considered, jurisdiction over both parties to a marriage was essential to the exercise of power to decree a divorce, but was simply a means of determining by a legal presumption whether both parties were within the jurisdiction. Of course the rigor of the English rule as to the domicil of the husband being the domicil of the wife is not controlling in this court, in view of the decisons to which we have previously referred, recognizing the right of the wife, for the fault of the husband, to acquire a separate domicil. *Barber* v. *Barber,* 21 How. 582; *Cheever* v. *Wilson,* 9 Wall. 108; *Atherton* v. *Atherton,* 181 U. S. 155.

And even in Scotland, where residence, as distinguished from domicil, was deemed to authorize the exercise of jurisdiction to grant divorces, it was invariably recognized that the presence within the jurisdiction of both parties to the marriage was essential to authorize a decree in favor of the complainant. Wharton, Confl. Laws, sec. 215, v. 1, p. 447; per Lord Westbury, in *Shaw* v. *Gould,* L. R. 3 H. L. 88.

As respects the decisions of this court. We at once treat as inapposite, and therefore unnecessary to be here specially reviewed, those holding, *a,* that where the domicil of a plaintiff in a divorce cause is in the State where the suit was brought, and the defendant appears and defends, as both parties are before the court, there is power to render a decree of divorce which will be entitled in other States to recognition under the full faith and credit clause (*Cheever* v. *Wilson*, *supra*); *b*, that as distinguished from legal domicil, mere residence within a particular State of the plaintiff in a divorce cause brought in a court of such State is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a non-resident defendant. *Andrews* v. *Andrews*, 188 U. S. 14; *Streitwolf* v. *Streitwolf*, 181 U. S. 179; *Bell* v. *Bell*, 181 U. S. 175. This brings us to again consider a case heretofore referred to, principally relied upon as sustaining the contention that the domicil of one party alone is sufficient to confer jurisdiction upon a judicial tribunal to render a decree of divorce having extraterritorial effect, viz., *Atherton* v. *Atherton*, 181 U. S. 155. The decision in that case, however, as we have previously said, was expressly placed upon the ground of matrimonial domicil. This is apparent from the following passage, which we excerpt from the opinion, at page 171:

"This case does not involve the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. In this case the divorce in Kentucky was by the court of the State which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky."

The contention, therefore, that the reasoning of the opinion demonstrates that the domicil of one of the parties alone was contemplated as being sufficient to found jurisdiction, but insists that the case decided a proposition which was excluded in unmistakable language. But, moreover, it is clear, when the facts which were involved in the *Atherton* case are taken into view, that the case could not have been decided merely upon the ground of the domicil of one of the parties, because that consideration alone would have afforded no solution of the problem which the case presented. The salient facts were these: The husband lived in Kentucky, married a citizen of New York, and the married couple took up their domicil at the home of the husband in Kentucky, where they continued to reside and where children were born to them. The wife left the matrimonial domicil and went to New York. The husband sued her in Kentucky for a divorce. Before the Kentucky suit merged into a decree the wife, having a residence in New York sufficient, under ordinary circumstances, to constitute a domicil in that State, sued the husband in the courts of New York for a limited divorce. Thus the two suits, one by the husband against the wife and the other by the wife against the husband, were pending in the respective States at the same time. The husband obtained a decree in the Kentucky suit before the suit of the wife had been determined and pleaded such decree in the suit brought by the wife in New York. The New York court, however, refused to recognize the Kentucky decree and the case came here, and this court decided that the courts of New York were bound to give effect to the Kentucky decree by virtue of the full faith and credit clause. Under these conditions it is clear that the case could not have been disposed of on the mere ground of the individual domicil of the parties, since upon that hypothesis, even if the efficacy of the individual domicil had been admitted, no solution would have been thereby afforded of the problem which would have arisen for decision, that problem being which of the two courts wherein the conflicting proceedings were pending had the paramount right to enter a binding decree. Having disposed of the case upon the principle of matrimonial domicil, it cannot in reason be conceived that the court intended to express an opinion upon the soundness of the theory of individual and separate domicil which, isolatedly considered, was inadequate to dispose of, and was, therefore, irrelevant to, the question for decision.

It is contended that an overwhelming preponderance of the decisions of state courts enforce the doctrine that it is the duty of the States, by virtue of the full faith and credit clause, to give within their borders the full effect required by that clause to decrees of divorce rendered in other States, where there was jurisdiction alone by virtue of the domicil of one of the parties. Whilst we may not avoid the duty of interpreting for ourselves the Constitution of the United States, in view of the persuasive force that would result if an overwhelming line of state decisions held the asserted doctrine, we come to consider that subject. To examine in detail the many decisions of state courts of last resort, most of which are referred to in the margin,[1] would expand this opinion to undue length. To avoid so doing, if possible, we propose to more particularly direct our attention to the cases in state courts which are specially relied on. In doing so we shall add cases in several of the States not particularly counted on in the argument. We shall do this for the purpose of evolving, if possible, from the state cases thus to be referred to, some classification typical of all the state decisions, hence enabling all the cases to which we do not specially refer to be brought within the appropriate class to which they pertain, without the necessity of reviewing them in detail. We shall not confine ourselves to the particular state decisions relied on, but shall consider such decisions in the light of the general rule obtaining in the particular State.

The cases specially relied on are *Thompson* v. *State*, 28 Alabama, 12; *Harding* v. *Alden*, 9 Maine, 140; *Ditson* v. *Ditson*, 4 R. I. 87; *Burlen* v. *Shannon*, 115 Massachusetts, 438; and *Felt* v. *Felt*, 59 N. J. Eq. 606, to which we shall add for the purposes above stated cases on the same subject decided in New York, Ohio, Wisconsin, Indiana and Missouri.

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[1] Cases relating to the validity and extraterritorial effect of a decree of divorce rendered upon constructive notice:

*Turner* v. *Turner*, 44 Alabama, 437; *In re James Estate*, 99 California, 374; *Knowlton* v. *Knowlton*, 155 Illinois, 158; *Dunham* v. *Dunham*, 162 Illinois, 589; *Field* v. *Field*, 215 Illinois, 496; *Hood* v. *State*, 56 Indiana, 263, 270; *Hilbish* v. *Hattle*, 145 Indiana, 59; *Kline* v. *Kline*, 57 Iowa, 386; *Van Orsdal* v. *Van Orsdal*, 67 Iowa, 35; *Chapman* v. *Chapman*, 48 Kansas, 636; *Rodgers* v. *Rodgers*, 56 Kansas, 483; *Maguire* v. *Maguire*, 7 Dana, 181; *Hawkins* v. *Ragsdale*, 80 Kentucky, 353; *Edwards* v. *Green*, 9 La. Ann. 317; *Smith* v. *Smith*, 43 La. Ann. 1140; *Butler* v. *Washington*, 45 La. Ann. 279; *Harding* v. *Alden*, 9 Maine, 140; *Stilphen* v. *Stilphen*, 58 Maine, 508; *Stilphen* v. *Hondlette*, 60 Maine, 447; *Garner* v. *Garner*, 56 Maryland, 127; *Lyon* v. *Lyon*, 2 Gray, 367; *Wright* v. *Wright* 24 Michigan 180; *Van Inwagen* v. *Van Inwagen* 86 Michigan, 333; *Thurston* v. *Thurston*, 58 Minnesota, 279; *Gould* v. *Crow*, 57 Missouri, 200; *Anthony* v. *Rice*, 110 Missouri, 223; *Smith* v. *Smith*, 19 Nebraska, 706; *Leith* v. *Leith*, 39 N. H. 20; *Doughty* v. *Doughty*, 28 N. J. Eq. 581; *Flower* v. *Flower*, 42 N. J. Eq. 152; *Felt* v. *Felt*, 59 N. J. Eq. 606; *Wallace* v. *Wallace*, 62 N. J. Eq. 509; *Lynde* v. *Lynde*, 162 N. Y. 405; *Winston* v. *Winston*, 165 N. Y. 553; *Irby* v. *Wilson*, 1 Dev. & Dat. Eq. 21 N. Car. 568; *Harris* v. *Harris*, 115 N. Car. 587; *Bidwell* v. *Bidwell*, 139 N. Car. 402, 52 S. E. Rep. 55, 58; *Cox* v. *Cox*, 19 Ohio St. 502; *Doerr* v. *Forsythe*, 50 Ohio St. 726; *Colvin* v. *Reed*, 55 Pa. St. 375; *Reel* v. *Elder*, 62 Pa. St. 308; *Ditson v. Ditson*, 4 R. I. 87; *McCreery* v. *Davis*, 44 S. Car. 195; *Thoms* v. *King*, 95 Tennessee, 60; *Prosser* v. *Warner*, 47 Vermont, 667, 673; *Cook* v. *Cook*, 56 Wisconsin, 195.

NEW YORK.—It is not questioned that the courts of New York are vested by statute with authority to render decrees of divorce where the plaintiff is domiciled within the State, which shall be operative in that State, even although the defendant is a non-resident and is proceeded against by constructive service.

*Borden* v. *Fitch,* 15 Johns, 121, and *Bradshaw* v. *Heath,* 13 Wend. 407, were decided, respectively, in the years 1818 and 1835. These cases, as declared by the Court of Appeals of New York in *People* v. *Baker,* 76 N. Y. 78, 82, upheld the principle that a court of another State could not dissolve the matrimonial relation of a citizen of New York, domiciled in New York, unless he was actually served with notice within the other State or voluntarily appeared in the cause. The doctrine that an action of divorce is one *inter partes* was thus clearly reiterated by Andrews, J., in *Jones* v. *Jones,* 108 N. Y. 415, 424:

"The contract of marriage cannot be annulled by judicial sanction any more than any other contract *inter partes,* without jurisdiction of the person of the defendant. The marriage relation is not a *res* within the State of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending."

That the principle referred to is still enforced by the New York court is shown by recent cases, viz., *Lynde* v. *Lynde,* 162 N. Y. 405; *Winston* v. *Winston,* 165 N. Y. 553, and the case at bar. And it is indubitable that under this doctrine the courts of New York have invariably refused, as they have done in the case at bar, to treat a divorce rendered in another State, under the circumstances stated, as entitled to be enforced in New York by virtue of the full faith and credit clause of the Constitution of the United States; and, indeed, have refused generally to give effect to such decrees even by state comity.

MASSACHUSETTS.—*Barber* v. *Root,* 10 Massachusetts 260; *Hanover* v. *Turner,* 14 Massachusetts, 227, and *Harteau* v. *Harteau,* 14 Pick. 181, were decided, respectively, in 1813, 1817 and 1833. In 1835 the legislature of Massachusetts incorporated into the statutes of that State, following a section forbidding the recognition of divorces obtained in another jurisdiction in fraud of the laws of Massachusetts, a provision reading as follows: "In all other cases, a divorce decreed in another State or country, according to the law of the place, by a court having jurisdiction of the cause and of both of the parties, shall be valid and effectual in this State." And it may be observed that this section, when submitted to the legislature by the commissioners for revising the Massachusetts statutes, was accompanied by the following comment (Rept. Comrs., pt. II, p. 123): "This is founded on the rule established by the comity of all civilized nations; and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be."

In *Lyon* v. *Lyon* (1854), 2 Gray, 367, the question was as to the validity in Massachusetts of a divorce decreed in Rhode Island in favor of one party to a marriage against the other who was domiciled in Massachusetts. The court refused to give extraterritorial effect to the Rhode Island decree. In the opinion by Chief Justice Shaw it was declared that the three cases which we have previously referred to sustained the doctrine, based upon general principles of law, that a decree of divorce rendered in another State without jurisdiction of both of the parties possessed no extraterritorial force.

In *Hood* v. *Hood* (1865), 11 Allen, 196, the controversy was this: The parties were married in Massachusetts and, after a residence in that State, moved together to Illinois. The wife left the domicil of the husband in Illinois and returned to Massachusetts. Thereafter, in Illinois, the husband sued the wife for a divorce on the ground of her desertion, obtained a decree, and married again. The case decided in Massachusetts was a suit brought in that State by the former wife against the former husband for divorce on the ground of adultery alleged to have been committed by him with the person whom he had married after the decree of divorce in Illinois had been rendered. The Illinois decree was pleaded in bar. The question whether the Illinois decree should be given extraterritorial effect in Massachusetts depended, under the rule announced in the previous cases, upon whether both the husband and wife were parties to the Illinois decree. For the purpose of the determination of this jurisdictional question it was held that it was necessary to ascertain whether the wife was justified, by the fault of the husband, in leaving him in Illinois and going back to Massachusetts. It was decided that if she was justified in leaving the husband, her legal domicil was in Massachusetts, and she was not a party to the Illinois decree, and that if she was not justified in living separate from the husband, the ordinary rule being that the domicil of the husband was the domicil of the wife, she was domiciled in Illinois, and must be considered as subject to the jurisdiction of the Illinois court. Applying this legal principle to the facts in the case before it, the court held that as there was no evidence showing that the wife had justifiable cause for leaving her husband, the legal presumption that the domicil of the husband was the domicil of the wife prevailed, and that the Illinois decree was entitled to extraterritorial effect in Massachusetts, and bound the wife, because rendered by a court having jurisdiction over both parties.

In *Shaw* v. *Shaw* (1867), 98 Massachusetts, 158, the facts were these: The parties were married in Massachusetts, lived there and left together for the purpose of settling in Colorado. On the journey, at Philadelphia, the wife was forced by the extreme cruelty of the husband to leave him. She returned to Massachusetts, while he went on to Colorado. Subsequently the wife sued in Massachusetts for a divorce from bed and board. The husband was brought in by substituted service and defaulted. The court, in the most explicit terms, recognized that a decree of divorce to have extraterritorial effect must be rendered with jurisdiction over both parties. It said (p. 159): "For the purposes of divorce the general rule of jurisprudence is that a divorce granted in the place of the domicil of both parties, and there valid, is good everywhere." The court came then to consider whether it could render a decree in Massachusetts in favor of the wife. This depended upon a statute of Massachusetts, which authorized the granting of a divorce where the cause for divorce occurred while the parties had lived together as husband and wife is Massachusetts, and where one of them lived in that State when the cause for divorce occurred. It was held that as at the time of the commission of the cruelty in Philadelphia charged against the husband the domicil of the parties in Massachusetts had not been lost, and as by that cruelty the wife was justified in returning to Massachusetts, and the subsequent acquisition of a new domicil by the husband in Colorado did not make such domicil that of the wife, there was jurisdiction, and the divorce was granted.

*Hood* v. *Hood* (1872), 110 Massachusetts, 463, was an attempt again to assail the validity of the Illinois decree of divorce which had been adjudged valid in 11 Allen, 196, because it was found that both the husband and wife had been parties to the decree. The Massachusetts decree so holding was therefore held to be *res judicata* as to all persons and to foreclose further inquiry into the validity of the Illinois decree of divorce.

In *Burlen* v. *Shannon* (1874), 115 Massachusetts, 438, the facts leading up to the controversy and those involved therein were as follows: Shannon and his wife lived together in Massachusetts, where she left him. Without stopping to refer to prior legal controversies which arose between Shannon and his wife and between Shannon and Mrs. Burlen, which are irrelevant to be considered, it suffices to say that Mrs. Burlen sued Shannon in 1850 to hold him liable for necessary supplies furnished to the wife. Shannon resisted on the ground that the wife had been living apart from him without his fault or consent, and this defense was maintained. (3 Gray, 387.) Shannon went to Indiana in 1855 and took up his domicil in that State, where, in 1856, he obtained a decree of divorce upon constructive service. Subsequently, in Massachusetts, Mrs. Burlen again sued Shannon for necessaries furnished to the wife between February 22, 1860, and February 7, 1866. He pleaded the Indiana divorce, and the validity of the divorce was assailed by Mrs. Burlen on the ground that the wife had not been a party to the divorce cause, and therefore the Indiana decree had not extraterritorial effect in Massachusetts. The court, in effect, after reiterating the previous rulings and referring to the statute concerning the necessity for the presence of both parties within the jurisdiction where a decree for divorce of another State was sought to be given effect in Massachusetts, also reiterated the previous ruling that the wife might acquire a separate domicil from the husband if she lived separate from him for justifiable cause. The court was brought, therefore, to consider whether Mr. and Mrs. Shannon were both parties to the Indiana decree on the ground that the domicil of the husband was the domicil of the wife. The solution of this question depended, as it had depended in *Hood* v. *Hood,* 11 Allen, 196, upon whether the wife was absent from the husband because of his fault. On this subject it was decided that the previous judgment in favor of Shannon and against Mrs. Burlen in the prior action between the parties had conclusively determined between them that Mrs. Shannon was absent from her husband without his fault or consent, and, therefore under the legal presumption that the domicil of the husband was the domicil of the wife, both the husband and wife were parties to the Indiana decree and it was not subject to attack in Massachusetts. To cite, as has sometimes been done, the language of the opinion of the court referring to the previous judgment in the earlier action between Mrs. Burlen and Shannon as if that language referred to the Indiana decree of divorce, leading to the implication that that decree was held to be conclusive, even if only one of the parties was domiciled in the State where the decree was rendered, not only is a plain misconception, but is equivalent to asserting that the Massachusetts court had overruled its previous decisions and disregarded the spirit, if not the letter, of the state statute without the slightest intimation to that effect.

In *Cummington* v. *Belchertown,* 149 Massachusetts, 223, the facts were these: The parties to a marriage, celebrated in Massachusetts, lived together in that State until the wife was taken to a Massachusetts asylum for the insane, when the husband abandoned her, acquired a domicil in New York, there brought suit on the ground of fraud for the annulment of the marriage, and obtained a decree. The wife was only constructively served with process, did not appear, and was not represented. The Massachusetts court held, upon the authority of the *Blackington* case (141 Massachusetts, 432), to which we have already referred, that if the decree was to be recognized in Massachusetts, it could only be on grounds of comity. And in concluding its opinion the court said:

"Upon the ground, then, that the decree of the New York court attempts to annul a marriage in Massachusetts between Massachusetts citizens, and thus affect the legal status of the woman, who has remained domiciled in Massachusetts, and has never been within the jurisdiction of the New York court, and deprive her of the rights acquired by her marriage, and especially because it declares the marriage void for a reason on account of which by the Massachusetts law it cannot be avoided, we are of opinion that it should not be enforced here, and that no principle of interstate comity requires that we should give it effect."

True it is the court reserved the question as to what effect might be given to a divorce if granted by a New York court under circumstances such as existed in that case. But, as a suit for a declaration of nullity and one for divorce are both but modes for determining judicially the status of the parties, it must in reason follow if jurisdiction over both is a prerequisite in the one class, it is of necessity also essential in the other.

MAINE.—In *Harding* v. *Alden* (1832), 9 Maine, 140, the facts were these: While living together in Maine a husband deserted his wife. He went to North Carolina, where he pretended to marry, and lived there with another woman. In the meantime the wife whom he had deserted took up her residence in Rhode Island, where she sued for a divorce on the ground of the adultery committed by the husband in North Carolina. The husband, who was notified in North Carolina, did not appear in the Rhode Island divorce cause. A decree of divorce was granted and the wife then remarried. The first husband, during the coverture, owned and alienated real estate in Maine, and a statute of that State provided that where a divorce was decreed for adultery by the husband, dower might be assigned to the divorced wife in the same manner as if the husband were dead. The divorced wife brought an action of dower in a court in Maine. The Rhode Island decree was held to possess validity in Maine and the statute relating to dower was decided not to be limited to divorces decreed within the State of Maine. Considering the opinion in its entirety, it is plain that the Rhode Island divorce was given recognition from considerations of right and justice and upon the ground of state comity. Thus, the court called attention to the fact that adultery was a cause for divorce in both States and that divorces were granted in Maine against non-residents; and, it was observed, that "there would be great inconvenience in holding" that divorces ought not to be recognized in other States when granted in the State where the *injured party* resided against one who had established his domicil in another State and there committed adultery.

True it is in the course of the opinion reasoning was employed tending to show that the Rhode Island court might be considered to have had jurisdiction in the complete sense and it was intimated that the full faith and credit clause might have application, but the operation of the Rhode Island decree in Maine was by the decree of the Maine court expressly limited to the dissolution of the marriage (p. 151). How far removed this was from giving to the Rhode Island decree the benefit of the full faith and credit clause will, we think, be made clear by what follows.

*Harding* v. *Alden* was decided at the July term, 1832. Less than two years afterward, on March 5, 1834, Public Laws, 1834, c. 116, p. 119, the statute of Maine regulating divorces was supplemented by various provisions, one such being the following: "Sec. 2. Be it further enacted, That in all cases where one party has been or shall be divorced from the bonds of matrimony, the court granting the same may, upon application therefor, grant to the other party a like divorce, on such terms and conditions as the said court in the exercise of a sound discretion may judge reasonable." This provision was carried into the Revised Statutes of 1840, c. 89, sec. 2, and although repealed in 1850, in a general revision of the divorce laws, it was held that the legislature did not intend to deprive the courts of Maine of the power to entertain a suit for divorce brought by a person from whom the other party to a marriage had already been divorced, and that the courts of Maine still possessed power to exercise jurisdiction over such suits. *Stilphen* v. *Stilphen,* 58 Maine, 508. In the cited case, although a husband had already obtained an absolute divorce, a like divorce was granted to the wife, and the court allowed to her certain articles of personal property and the sum of $500. In overruling exceptions to the decree the appellate court adopted the theory that the second decree in no wise impugned the first, and was important only as enabling "the court to make such ancillary decrees concerning the property as justice and humanity may require" (p. 517). In the course of the opinion the court said (p. 516):

"There is no class of cases in which the court is so liable to be imposed upon, and a decision obtained contrary to the truth, as *ex parte* divorce suits. The notice is often imperfect, so that the confession of guilt implied in the default is deceptive. And it is well known that witnesses, testifying in the presence of one of the parties, and in the absence of the other, will so alter and magnify the faults of the absent, and suppress everything that makes against the party present, that it is impossible to tell where the truth and real merits of the controversy are. When both parties are present, each is sure to put the other in the wrong; and *a fortiori* is this true, when one of the parties is permitted to testify in the absence of the other, as is now the case in divorce suits. We repeat, therefore, that there is no class of cases in which the court is so liable to be imposed upon; and it seems to us of the utmost importance that the court should be possessed of the power in some form to revise their decisions in this class of cases; otherwise, the grossest injustice is liable to be done."

In the light of this decision it cannot be assumed that the courts of Maine would give to a citizen of that State against whom a divorce had been obtained in a foreign jurisdiction, upon constructive service, a less degree of relief than they afford as to a decree rendered in Maine, both parties being present and bound by the decree.

RHODE ISLAND.—*Ditson* v. *Ditson* (1856), 4 R. I. 87, was a suit for divorce on the grounds of desertion, extreme cruelty, and non-support, brought by a wife domiciled in Rhode Island against the husband, who had never resided in Rhode Island, and whose whereabouts was unknown. The question was whether the Rhode Island court ought to exercise jurisdiction. The opinion was mainly devoted to refuting the reasoning employed by Chief Justice Shaw in his opinion in the case of *Lyon* v. *Lyon*, 2 Gray, 367, in which case, as we have previously shown, the Massachusetts court refused to give effect to a Rhode Island decree of divorce where both parties were not within the jurisdiction. The Rhode Island court (in the *Ditson* case) in effect declared that it would not exercise jurisdiction to grant a divorce if it considered that a decree rendered by it would not be entitled to extraterritorial effect because of a lack of actual jurisdiction over the defendant. The court, however, proceeded to reason that a suit for divorce was in effect a proceeding *in rem*, and that jurisdiction over one of the parties to a suit for the dissolution of the marriage tie drew to the court jurisdiction of the other party, and thereby gave full and complete jurisdiction over the status of both parties, and upon that hypothesis decided that it would exercise jurisdiction, and that its decree dissolving the marriage would be entitled to the benefit of the full faith and credit clause of the Constitution and have binding efficacy in every other State.

New Jersey.—Whilst the courts of New Jersey have exercised the power to grant a divorce from a non-resident defendant, upon constructive service, those courts have from the beginning applied to similar decrees of divorce granted in other States, when sought to be enforced in New Jersey against citizens of that State, a rule like the one prevailing in New York, that is, they decline to enforce them even upon the principles of comity. *Doughty* v. *Doughty,* 28 N. J. Eq. 581, 586; *Flower* v. *Flower,* 42 N. J. Eq. 152. Recently, however, it has been decided, *Felt* v. *Felt,* 59 N. J. Eq. 606, that where a decree of divorce was rendered in another State, and the complainant alone was subject to the jurisdiction of the court, but it was shown that the defendant had been personally served outside of the jurisdiction with notice of the pendency of the divorce proceeding and was afforded reasonable opportunity to make defense and did not avail of the opportunity, effect would be given to such decree in New Jersey, upon principles of comity, provided that the ground upon which the decree rested was one which the public policy of New Jersey recognized as a sufficient cause for divorce. In *Wallace* v. *Wallace,* 62 N. J. Eq. 509, the subject is quite fully reviewed.

Ohio.—In *Cooper* v. *Cooper* (1836), 7 Ohio, 594, without citation of authority, a divorce granted in Indiana, from a resident of Ohio, upon constructive service, was held to bar an application for divorce and alimony in Ohio. In *Mansfield* v. *McIntyre* (1840), 10 Ohio, 27, despite a divorce obtained in Kentucky, by a husband, upon constructive service, the divorced wife was regarded in Ohio as the widow of her former husband after his decease, and as such widow entitled to dower.

In *Cox* v. *Cox,* 19 Ohio St. 502, decided at the December term, 1869, the facts were these: The husband deserted the wife in Ohio, went to Indiana and there obtained a divorce, upon constructive service. The wife remained in Ohio, and three years after the granting of the Indiana divorce to the husband she sued him for divorce and for alimony, alleging abandonment and gross neglect of duty. The trial court granted a divorce and alimony. The husband appealed, but as such an appeal, under the statutes of Ohio, did not affect the decree as to the divorce, the District Court considered only the question of alimony and rendered a new decree for alimony against the defendant. The case was then taken to the Supreme Court of the State. In that court attention was called to the fact that under the statutes of Ohio and the decisions of its courts jurisdiction might be exercised over non-residents in divorce cases, and reference was made to various authorities as tending to show that public policy required the recognition of the validity of such decrees in other States as to the dissolution of the marriage. After stating the facts, and observing that the wife was entitled under the laws of Ohio to either divorce or alimony, or both, at her election, and alluding to the Indiana decree, the court said (p. 512):

"The question, therefore, is, whether the *ex parte* decree can be made available, not merely to effect a dissolution of the marriage, but to defeat the right of the petitioner to the alimony which the statute, upon the facts as they exist in regard to the husband's desertion, intended to provide for her.

"We think the decree ought not to have such effect.

"In arriving at this conclusion we make no distinction between a decree rendered, under the circumstances of this case, in a foreign, and one rendered in a domestic forum.

"In either case, to give a decree thus obtained the effect claimed for it, would be to allow it to work a fraud upon the pecuniary rights of the wife. Such a result, in our opinion, is rendered necessary by no principle of comity or public policy—the only grounds upon which *ex parte* decrees of divorce are authorized and supported.

"It is not essential to the allowance of alimony that the marriage relation should subsist up to the time it is allowed. On appeal, alimony may be decreed by the District Court, notwithstanding the subsisting divorce pronounced by the Court of Common Pleas. It is true that the statute speaks of the allowance as being made to the wife. But the term 'wife' may be regarded as used to designate the person, and not the actual existing relation; or the petitioner may still be regarded as holding the relation of wife for the purpose of enforcing her claim to alimony."

The following cases were cited by the court as sustaining the right of the wife to maintain an independent proceeding for alimony, even after the husband had obtained a divorce:

*Richardson* v. *Wilson*, 8 Yerger, 67; *Crane* v. *Meginnis*, 1 Gill & J. 463, and *Shotwell* v. *Shotwell*, 1 Sm. & M. Ch. R. 51.

In *Doerr* v. *Forsythe* (1893), 50 Ohio St. 726, an Indiana divorce granted to a husband, upon constructive service, was held not to bar the right of the wife to dower in lands in Ohio owned during coverture by the husband.

ALABAMA.—In *Thompson* v. *State* (1856), 28 Alabama, 12 the facts were these: Thompson deserted his family in Mississippi, went to Arkansas and there obtained a divorce upon constructive service. The wife returned to her father's home in Alabama, and, after the divorce, the husband also went to Alabama, where he again married. He was prosecuted for and convicted of bigamy. The conviction was set aside, however, upon the ground that the guilt or innocence of the accused depended upon the question as to whether he had a *bona fide* domicil in Arkansas during the pendency of the proceedings for divorce. *Harding* v. *Alden*, 9 Maine, 140, was cited as authority.

In a subsequent case, however, *Turner* v. *Turner* (1870), 44 Alabama, 437, the Supreme Court of Alabama strictly limited, as against a citizen of Alabama, the effect of a divorce rendered in another State upon constructive service. The parties were married in Alabama, where the husband deserted the wife, and located in Indiana, where he obtained a divorce upon constructive service. The wife remained in Alabama, and, after the granting of the divorce to the husband, she sued him in Alabama for a divorce and alimony. The husband pleaded the Indiana decree in bar. The trial court, however, held that the wife was entitled to maintain her suit and entered a decree for divorce and alimony. In affirming the decree the Supreme Court of Alabama, upon the authority of *Thompson* v. *State*, *supra*, said that the decree of divorce obtained by the husband in Indiana might protect him against prosecution for bigamy should he marry again in Alabama. Referring to that decree it further said (p. 450):

"But without stopping to inquire whether it was obtained by him by fraud, and therefore is vicious on that account or not, it certainly cannot affect the rights of the complainant, except her right in the husband as husband. If it is valid, it unmarries him and sets him free from his marital vows to her. He is no longer the complainant's husband. But it does not settle her right to alimony; it does not settle her right to dower in his lands, and her statutory right to distribution of his property in this State, in the event she should survive him, nor any other interest of a pecuniary character she may have against him. . . . It is the duty of the State to protect its own citizens, within its own borders. This is the natural compensation for allegiance. This high duty extends to all the pecuniary rights of the citizens, as well as to the rights of security of person. . . . No obligation of comity is paramount to this duty. Without a constant and effective exertion of it, citizenship would become a farce. . . . The wife is as much the citizen of the State as the husband, and is entitled to the protection of its laws to the same extent, so long as she remains within its jurisdiction. It would be a scandal to justice to imperil her, and sacrifice her most important and cherished rights upon a mere technicality; a technicality that often contradicts the truth. When her protection requires it, it would be cruelly unjust for the State, of her actual residence and domicil, to repudiate its own right of jurisdiction to give her aid. I therefore think that the better opinion is, that she has the right to file her bill here, and to all the relief that the court could give her, notwithstanding her husband might not be domiciled in this State at the commencement and during the whole pendency of her litigation with him. . . .

"Then, if the state courts have competent jurisdiction in such a case, as undoubtedly they have, they may go on and exercise that jurisdiction in the manner and to the extent prescribed by their own laws.

"Under the laws of this State, by the contract and consummation of a marriage, the wife, if she has no separate estate, becomes entitled to dower in the husband's lands, and a certain distributive interest in his personal estate, if she survives him, and to temporary and permanent alimony out of his estate upon a separation by divorce in her favor. These are rights that she cannot legally be deprived of without her consent or her fault. . . . If this were not so, then these important statutory provisions in favor of the wife would be repealed or rendered null by a foreign divorce, of which she had no notice and no knowledge, during its whole progress through the forms of a foreign court. To sue in her own domicil is necessary for the protection of the wife. It, therefore, overrides the technical rule that the husband's domicil is also the domicil of the wife. . . . Here the testimony shows that the wife has no separate estate. The witnesses for the defendants say when she was married she 'brought nothing with her.' It also appears that during her connection with the defendant Matthew Turner, as his wife, she was a chaste, industrious, economical, faithful, useful and obedient wife; and that the husband's property is very considerable; worth possibly not less than one hundred thousand dollars. It is also shown that his three children by a former marriage are already sufficiently provided for.

"Under such a state of facts the sum of thirty thousand dollars was not an unreasonable sum for permanent alimony, to be allowed to the wife, nor the sum of eight hundred dollars too large for temporary alimony. . . ."

INDIANA.—In *Tolen* v. *Tolen* (1831), 2 Blackf. 407, the facts were these: A wife, on being deserted in Kentucky, removed to and became domiciled in Indiana, and after a residence there of five years sued for a divorce from the non-resident husband. In an opinion of great length the court considered the question of its power to grant a divorce which would be *valid in Indiana,* and decided it had such power, but expressly reserved passing on the question whether the decree would have extraterritorial force.

In *Hood* v. *State* (1877), 56 Indiana, 263, 271, it was declared that as an *ex parte* divorce in favor of one domiciled within the jurisdiction of a State, and against a non-resident, although founded upon constructive service, was valid as to the plaintiff, *"public policy* demands that it should be held valid as to both parties."

In *Hilbish* v. *Hattle* (1896), 145 Indiana, 59, certain sections of the Indiana Revised Statutes, wherein it was provided that the divorce of one party to a marriage should dissolve the contract as to both, and that a divorce decreed in another State by a court having jurisdiction of the cause should have full effect in Indiana, were held to be applicable to a decree of divorce granted in another State, in favor of a husband, upon constructive service, and the same effect was given to the decree, as to the rights of the wife in the property of the husband in Indiana, as if the divorce had been rendered in Indiana.

MISSOURI.—In *Gould* v. *Crow,* 57 Missouri, 200, a decree of divorce regularly obtained by a husband in Indiana, on an order of publication, without personal service, was held to operate as a divorce in favor of the husband in Missouri, so as to prevent the wife from claiming her dower in lands in Missouri owned by the husband. *Harding* v. *Alden*, 9 Maine, 140, was relied upon as authority. A statute of Missouri, barring the claim of a wife for dower after divorce granted by reason of her fault, was held to apply to all divorces, whether obtained in Missouri or in other States, and whether obtained on personal service or by order of publication. The doctrine of *Gould* v. *Crow* was reaffirmed and applied in *Anthony* v. *Rice*, 110 Missouri, 223.

WISCONSIN.—In *Shafer* v. *Bushnell* (1869), 24 Wisconsin, 372, an *ex parte* divorce granted a wife in Minnesota upon constructive service of the defendant, a citizen of Minnesota, was held upon the grounds of comity to be conclusive in Wisconsin in respect to the status or domestic and social condition of the wife. The decree was held to bar an action for criminal intercourse against the person whom the complainant in the divorce suit married after the granting of the divorce.

In *Cook* v. *Cook* (1882), 56 Wisconsin, 195, however, in an elaborate opinion, an *ex parte* divorce obtained in Michigan upon constructive service merely, by a husband who had deserted his wife in Wisconsin, was held not to affect the status of the wife in Wisconsin nor to bar her from suing in Wisconsin for divorce, alimony, allowance and a division of the property of such husband situated within Wisconsin.

Deducing the law of the several States from the rulings of their courts of last resort which we have just reviewed and ignoring mere minor differences, the law of such States is embraced within one or the other of the following headings:

*a.* States where the power to decree a divorce is recognized, based upon the mere domicil of the plaintiff, although the decree when rendered will be but operative within the borders of the State, wholly irrespective of any force which may be given such decree in other States. Under this heading all of the States are embraced with the possible exception of Rhode Island.

*b.* States which decline, even upon principles of comity, to recognize and enforce as to their own citizens, within their own borders, decrees of divorce rendered in other States, when the court rendering the same had jurisdiction over only one of the parties. Under this heading is embraced Massachusetts, New Jersey (with the qualification made by the decision in 59 N. J. Eq. 606) and New York.

*c.* States which, whilst giving some effect to decrees of divorce rendered against its citizens, in other States where the court had jurisdiction of the plaintiff alone, either place the effect given to such decrees upon the principle of state comity alone, or make such limitations upon the effect given to such decree as indubitably establishes that the recognition given is a result merely of state comity. As the greater includes the less, this class of course embraces the cases under the previous heading. It also includes the States of Alabama, Maine, Ohio and Wisconsin.

*d.* Cases which, although not actually so deciding, yet lend themselves to the view that *ex parte* decrees of divorce rendered in other States would receive recognition by virtue of the due faith and credit caluse. And this class embraces Missouri and Rhode Island.

Coming to consider, for the purpose of classification, the decided cases in other States than those previously reviewed, which have been called to our attention, the law of such States may be said to come under one or the other of the foregoing headings, as follows:

Proposition *a* embraces the law of all the States, since in the decision of no State is there an intimation expressing the exception found in the Rhode Island case which caused us to exclude that State from this classification.

Under proposition *b* comes the law of the States of Pennsylvania, Vermont and South Carolina. A line of decisions of the State of North Carolina would also cause us to embrace the law of that State within this classification, but for a doubt engendered in our minds as to the effect of the law of North Carolina on the subject, resulting from suggestions made by the North Carolina court in the opinion in the *Bidwell*, case, 52 S. E. Rep. 55.

Proposition *c* embraces the law of Kansas, Louisiana, Maryland, Michigan, Minnesota, Nebraska and New Hampshire. And it is pertinent here to remark that in Michigan, 3 Comp. Laws Michigan (1897), par. 8621, c. 232, sec. 6, the obtaining of a divorce in another State from a citizen of Michigan is made cause for the granting of a divorce in Michigan to its citizens. A like provision is also in the statutes of Florida. Rev. Stat. Florida, (1902), sec. 1480.

Under proposition *d* we embrace the remaining States, although as to several the classification may admit of doubt, viz., California, Illinois, Iowa, Kentucky and Tennessee.

It indubitably, therefore, follows from the special review we have made of cases in certain States, and the classification just made of the remaining state cases which were called to our attention and which we have previously cited in the margin, that the contention is without foundation, that such cases establish by an overwhelming preponderance that, by the law of the several States, decrees of divorce obtained in a State with jurisdiction alone of the plaintiff are, in virtue of the full faith and credit clause of the Constitution, entitled to be enforced in another State as against citizens of such State. Indeed the analysis and classification which we have made serves conclusively to demonstrate that the limited recognition which is given in most of the States to such *ex parte* decrees of divorce rendered in other States is wholly inconsistent with the theory that such limited recognition is based upon the operation of the full faith and credit clause of the Constitution of the United States, and on the contrary is consistent only with the conception that such limited recognition as is given is based upon state comity. No clearer demonstration can be made of the accuracy of this statement than the obvious consequence that if the full faith and credit clause were now to be held applicable to the enforcement in the States generally of decrees of divorce of the character of the one here involved it would follow that the law of nearly all of the States would be overthrown, and thus it would come to pass that the decisions which were relied upon as establishing that the due faith and credit clause applies to such decrees would be overruled by the adoption of the proposition which it is insisted those decisions maintain. The only escape from this conclusion would be to say that the law of the States as shown by the decisions in question would remain unaffected by the ruling of the full faith and credit clause because not repugnant to that clause. This would be, however, but to assert that the full faith and credit clause required not that full faith and credit be given in one State to the decrees of another State, but that only a limited and restricted enforcement of a decree of one State in another would fulfill the requirements of that provision of the Constitution. To so decide would be to destroy the true import of the full faith and credit clause as pointed out in the outset of this opinion. Thus, in its ultimate aspect the proposition relied upon reduces itself to this, either that the settled law of most of the States of the Union as to divorce decrees rendered in one State, where the court rendering the decree had jurisdiction only of the plaintiff, must be held to be invalid, or that an important provision of the Constitution of the United States must be shorn of its rightful meaning.

Without questioning the power of the State of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the State of New York to give to a decree of that character rendered in Connecticut, within the borders of the State of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that State, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause. It therefore follows that the court below did not violate the full faith and credit clause of the Constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore,

*Affirmed.*

MR. JUSTICE BROWN, with whom were MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE HOLMES, dissenting.

Marriage between these parties was solemnized June 4, 1868. They separated the same day, without a consummation, and have never lived together since. No matrimonial domicil was ever established in New York or elsewhere. Defendant left New York soon after the wedding, drifted about the country for several years, and finally settled in Connecticut in 1877; remained there twelve years, during which time, and in 1881, he obtained a divorce in the Superior Court in Litchfield County, which he now sets up in defense of this action.

Plaintiff took no steps for twenty-six years to obtain a legal separation or maintenance, when, in July, 1894, she applied to the Superior Court of the State of New York for a summons by publication. The defendant did not appear, and a decree was rendered against him by default, separating the parties and granting alimony of $1,500 a year. This decree appears to have been abortive, so far as respects alimony at least, probably for lack of personal service on the defendant. Meantime, and in 1891, defendant had inherited a considerable property from his father.

This action was begun by a summons dated June 3, 1899, thirty-one years after the marriage; was served upon the defendant, who answered December 18, 1899, setting up, amongst other things, the decree of the Superior Court of Litchfield County, dissolving the marriage, the validity of which presents the only Federal question in this case.

1. This decree is attacked upon the ground that the Connecticut court acted without jurisdiction of the parties lawfully obtained. The record in that case shows that notice of the pendency of the petition was ordered to be published in a Litchfield paper, and also that a copy of the petition be sent to the respondent by mail, postage paid, at Tarrytown, New York. While there is no affidavit of the publication of the notice, there is a recital in the decree "that said complaint and writ have been duly served upon the defendant pursuant to an order of notice made thereon by the clerk of this court." This is sufficient *prima facie* evidence of the publication to entitle the record to be received. *Applegate* v. *Lexington &c. Mining Co.*, 117 U. S. 255, 269, wherein it was said by the court that "while it must be conceded that, in order to give the court jurisdiction over the persons of the defendants, all the steps pointed out by the statute to effect constructive service on non-residents were necessary, yet it does not follow that the evidence that the steps were taken must appear in the record, unless indeed the statute, expressly or by implication, requires it. . . . Therefore every presumption not inconsistent with the record is to be indulged in, in favor of its jurisdiction. . . . It is to be presumed that the court before making its decree took care to see that its order for constructive service, on which its right to make the decree depended, had been obeyed."

As the record was rejected for reasons appearing only upon its face, it is unnecessary to decide whether the recitals in the decree can be contradicted. Possibly the New York court might have assailed its validity by showing that, notwithstanding the recitals in the record, the court acquired no jurisdiction of the defendant by failure to comply with the order of the court with reference to the publication of notice in a newspaper, or in sending a copy of the petition and complaint to the defendant by mail at Tarrytown, New York, the last known place of residence. The fact that the referee refused to admit the record, even as *prima facie* evidence, foreclosed any defense founded upon the actual failure to obtain jurisdiction over the defendant.

There is no doubt of the proposition that a decree of divorce may be lawfully obtained at the matrimonial domicil, notwithstanding that the defendant may have taken up his or her residence separate from the other party in another State, providing that the law of the domicil with respect to the personal service or publication be scrupulously observed. *Atherton* v. *Atherton,* 181 U. S. 155.

Doubtless the jurisdiction of the court granting the divorce may be inquired into, and if it appear that the plaintiff had not acquired a *bona fide* domicil in that State at the time of instituting proceedings, the decree is open to a collateral attack, *Bell v. Bell,* 181 U. S. 175, and a recital in the proceedings of a fact necessary to show jurisdiction may be contradicted. *Thompson* v. *Whitman,* 18 Wall. 457; *Streitwolf* v. *Streitwolf,* 181 U. S. 179; *Andrews* v. *Andrews,* 188 U. S. 14.

Subject to these conditions, each State has the right to regulate the marital *status* of its citizens, at least so far as to determine in what manner and by whom marriages may be solemnized, what shall be deemed the age of consent, what obligations are assumed, what property rights are created, for what causes divorces shall be granted, for what length of time the domicil of plaintiff shall have been acquired prior to the institution of the proceedings, and in what manner notice shall be given to the defendant. Nor is the power of the legislature in this connection ousted by the fact that the other party to the contract resides in another State, provided that in case of proceedings adverse to such party he or she shall be given such notice as due process of law requires. If such proceedings be *in rem* or *quasi in rem,* notice by publication is ordinarily deemed sufficient. But in case of actions *in personam* for the recovery of damages, personal service within the jurisdiction is vital to the proceedings. *Pennoyer* v. *Neff,* 95 U. S. 714; *Huling* v. *Kaw Valley Railway and Improvement Co.,* 130 U. S. 559.

By the laws of Connecticut of 1878, c. 71, p. 305, exclusive jurisdiction is given to the Superior Courts to grant divorces for several causes, among which are "wilfull desertion for three years with total neglect of duty," with a further provision (Gen. Stats. 4555), "that plaintiff shall have continuously resided in the State three years next before the date of the complaint," with certain exceptions not material to be noticed. A further provision, sec. 4553, that, "where the adverse party resides out of, or is absent from the State, or the whereabouts of the adverse party is unknown to the plaintiff, any judge or clerk of the Supreme Court of Errors, or the Superior Court, or any county commissioner, may make such order of notice as he may deem reasonable, and, such notice having been given and duly proved to the court; it may hear such complaint if it find that the defendant has actually received notice that the complaint is pending, and if it shall not appear that the defendant has had such notice, the court may hear such case, or, if it see cause, order such further notice to be given as it may deem reasonable, and continue the complaint until the order is complied with."

The complaint alleged a wilful desertion of the plaintiff for more than three years, and the court found this to be the fact.

2. The case turns upon the question whether the Superior Court of Litchfield County gained jurisdiction by a residence of the plaintiff within the State for more than three years. The testimony also showed that the defendant had acquired a separate domicil in New York, and had been living there for about thirteen years.

In discussing this question two propositions may be admitted at once, and discarded as having no relevancy to the case:

1. That a judgment for damages in an action *in personam* is valid only when personal service has been made upon the defendant within the jurisdiction of the court rendering the judgment. This disposes at once of the cases of *Pennoyer* v. *Neff*, 95 U. S. 714; of *Mississippi &c. R. R. Co.* v. *Ward*, 2 Black, 485, where an Iowa court had undertaken to abate a nuisance on the Illinois side of the Mississippi river; and of *Delaware &c. R. R. Co.* v. *Pennsylvania*, 198 U. S. 342, where a State had attempted to tax property having a permanent *situs* in another State.

2. That the courts of one State may not grant a divorce against an absent defendant to any person who has not ac-

quired a *bona fide* domicil in that State. The same rule applies if he has removed thither solely for the purpose of acquiring a domicil and obtaining a divorce for a cause, which would have been insufficient in the State from which he removed. *Andrews* v. *Andrews,* 188 U. S. 14.

The jurisdiction of the Connecticut court in this case is shown, not by the facts as they appear in this case, but from the record in that case, and primarily from the petition, which under the practice in that State is incorporated with the summons. The allegations are:

"On the first day of January, 1869, the defendant wilfully deserted the plaintiff, and has continued said desertion, with total neglect of all the duties of the marriage on her part to be performed to the date of this writ, being for more than three years, and during the plaintiff's residence in this State."

It is conceded that such desertion is good ground for a divorce in Connecticut, which may be granted to a plaintiff who has continuously resided in the State three years next before the date of the complaint. The complaint obviously made a case for divorce under the statute. The court found that the complaint and writ had been duly served on the defendant, pursuant to an order of notice made thereon by the clerk; that the allegations of the complaint had been sustained and a divorce was granted.

The case then resolves itself into the single question whether a divorce granted to a plaintiff lawfully domiciled within a State as against a defendant domiciled in another State, who has been served by publication or letter only, is a valid defense to a suit by the latter for a separation and alimony.

Certain cases in this court tend strongly to support the proceedings in Connecticut. *Strader* v. *Graham*, 10 How. 82, was an action to recover the value of certain slaves carried into Ohio, a free State. The case was dismissed, as involving a question of the local law of Kentucky, the court remarking: "Every State has an undoubted right to determine the *status,* or domestic and social condition, of the persons domiciled within its territory. . . . and that it was exclusively in the power of Kentucky," (wherein the suit was brought) "to determine for itself whether their employment in another State should or should not make them free on their return."

In *Barber* v. *Barber,* 21 How. 582, a New York court decreed a separation and alimony to the wife. The husband removed to Wisconsin for the purpose of placing himself beyond the jurisdiction of the court which could enforce it, and there obtained a divorce *a vinculo* upon the ground of abandonment. The sole question raised by the record was: "Whether a wife divorced *a mensa et thoro* can acquire another domicilation in a State of this Union different from that of her husband, to entitle her, by her next friend, to sue him in a court of the United States, having equity jurisdiction, to recover from him alimony due, and which he refuses to make arrangement to pay; and whether a court of equity is not a proper tribunal for a remedy in such a case."

It was a suit to recover upon a judgment obtained in New York before proceedings instituted in Wisconsin, and was sustained. Obviously, the Wisconsin divorce was no defense, but its validity was not impugned.

*Cheever* v. *Wilson*, 9 Wall. 108, turned upon certain rights of property, and incidentally upon a divorce obtained in Indiana, in a suit in which the defendant appeared. The case, however, is valuable for two questions decided: First, that a decree of divorce, valid and effectual by the laws of the State in which it was obtained, is valid and effectual in all other States; second, that a wife may acquire a domicil different from her husband's whenever it is necessary or proper that she should have such a domicil; and on such a domicil, if the case otherwise allow it, may institute proceedings for divorce, though it be neither her husband's domicil nor have been the domicil of the parties at the time of the marriage, or of the offense.

Of course, it follows that if the wife may obtain a new domicil her husband may do likewise, as was done in this case, after the separation or abandonment had taken place. In delivering the opinion, Mr. Justice Swayne observed: "The decree (of divorce) was valid and effectual, according to the law and adjudications, in Indiana."

The Constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. "'If a judgment is conclusive in the State where it is rendered, it is equally conclusive everywhere' in the courts of the United States."

In *Cheely* v. *Clayton,* 110 U. S. 701, a divorce obtained in a territorial court, upon notice by publication insufficient under the laws of the Territory, was held to be of no effect. The court, however, observing: "If a wife is living apart from her husband without sufficient cause, his domicil is in law her domicil; and, in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicil, after reasonable notice to her, either by personal service or by publication, in accordance with its laws, is valid, although she never in fact resided in that State," citing *Burlen* v. *Shannon*, 115 Massachusetts, 438, and *Hunt* v. *Hunt*, 72 N. Y. 218.

In *Maynard* v. *Hill*, 125 U. S. 190, a legislative divorce was upheld, and it was said that the fact that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the act. It was further said that though the conduct of the husband merited the strongest reprobation, his abandonment of his wife, his loose morals and shameless conduct could have no bearing upon the power of the assembly to pass the act.

Four recent decisions in this court are too important to pass unnoticed. In *Bell* v. *Bell*, 181 U. S. 175, and in *Streitwolf* v. *Streitwolf* (p. 179), it was held that a divorce obtained in a State in which neither party was domiciled, upon service by publication and in another State, was entitled to no faith and credit. These decisions were unanimous. And in *Andrews* v. *Andrews*, 188 U. S. 14, that a divorce obtained by one who had gone into another State to procure a divorce in fraud of the law of the domicil, was also invalid.

There remains the case of *Atherton* v. *Atherton*, 181 U. S. 155, a divorce obtained by a husband in Kentucky which had been the matrimonial domicil, though the wife had been absent from the State for several months, and apparently had attempted to acquire a new domicil in New York. The court took care to confine the case to the one point decided, namely, the validity of a divorce obtained at the matrimonial domicil. The court out of abundant caution expressly disclaimed that the case involved the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. "In this case, the divorce in Kentucky was by the court of the State, which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky."

While the *Atherton* case, as already stated, was confined to a divorce obtained at the matrimonial domicil, the cases cited by Mr. Justice Gray in his opinion relate to divorces obtained in a State which was the domicil only of the complaining party, and are practically the same as those cited by him in his opinion as Chief Justice of Massachusetts in *Burlen* v. *Shannon*, 115 Massachusetts, 438. In reading the two cases together one is strongly impressed with the idea that in the *Atherton* case he had the former case in mind, and gave it such approval as the facts in the latter case would warrant. Not only had the Court of Appeals of Kentucky decided that a wife residing in that State was entitled to obtain a decree of divorce against her husband who had left the State, *Rhyms* v. *Rhyms*, 7 Bush, 316; *Perzel* v. *Perzel*, 91 Kentucky, 634, but a number of cases from other States were cited holding to the same principle.

The opinion of the court in the present case admits that where the domicil of the husband is also the domicil of matrimony, the courts of that domicil may disregard an unjustifiable absence of the wife therefrom, and treat her as having her domicil there for the purpose of dissolving the marriage as to both parties, and that such dissolution would be recognized in all other States by virtue of the full faith and credit clause, citing to this effect *Atherton* v. *Atherton*, 181 U. S. 155, and, as a corollary therefrom, it is admitted that no question can arise concerning the right of the State of Connecticut to give effect to a decree of divorce rendered in favor of the husband while domiciled in that State. The question is, undoubtedly, as stated, whether the Connecticut court, in virtue of the domicil of the husband in that State, had jurisdiction to render a decree against the wife which was entitled to be enforced in other States, under the full faith and credit clause.

I deny, however, that the final question is whether this would be enforcing a *personal* judgment rendered in another State against the defendant, over whom the court rendering the judgment had not acquired jurisdiction. A proceeding for divorce is not *in personam* nor of an exceptional character, except so far as all proceedings *in rem* are governed by a different rule from that applicable to proceedings *in personam*. The validity of the latter class depends upon personal service of the defendant being obtained within the jurisdiction. The validity of the former depends upon the jurisdiction of the court over the *res*—in this case the marriage relation, the domicil of the plaintiff, and such jurisdiction over the defendant as is consonant with the general principles of the constitution with regard to due process of law.

The proposition of the opinion, as we understand it, may be summarized as follows:

That, if one government by virtue of its authority over marriage, may dissolve the tie as to citizens of another government, that other government would have a similar power, and hence the right of every government over its own citizens might be rendered nugatory by the exercise of the power which every other government possesses. To illustrate by the present case: That, if the husband may desert his original domicil in New York, go to the State of Connecticut, acquire a domicil there and procure a divorce which would be binding in New York as to the party there domiciled, it would follow that the power of the State of New York as to the dissolution of the marriage, as to its domiciled citizen, would be of no practical avail. The opinion, however, fails to state the logical result of this proposition, viz., that no divorce would be possible in either State without a personal service upon the other within the State. If the husband, having his domicil in Connecticut, could not obtain a divorce against his wife domiciled in New York without a personal service, it follows that the wife domiciled in New York could not obtain a divorce against her husband in that State without a personal service there.

Undoubtedly the laws of some States are more liberal upon the subject of divorce than those of other States, but that does not affect the question. If the complaining party has acquired a domicil in the State in which he institutes proceedings, he is entitled to the benefit of the laws of that State with respect to the causes of divorce.

It is argued that, as the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce, yet, if the validity of the Connecticut divorce in this case be sustained, it follows that the destruction of the power of the States over the dissolution of marriage of its own citizens would be brought about by the full faith and credit clause of the Constitution. But this was the very point decided in the *Atherton* case, where a divorce obtained in Kentucky by publication was held good in New York, as against a proceeding by the wife for a divorce in that State. It is true that the matrimonial domicil was in Kentucky. But this does not affect the proposition asserted in the opinion, that the decree did work a dissolution of the marriage, as to her by the operation of the full faith and credit clause of the Constitution, and to that extent it did work a destruction of the power of the State of New York over the dissolution of the marriage. But the argument to that effect was not considered by this court to be sound. It does undoubtedly follow that the *res*, that is, the marriage relation, was as much in the State of New York as it was in the State of Connecticut, but it does not follow that the action of the Connecticut court with respect to that *res* is not as much obligatory in New York as in Connecticut. It is of the very essence of proceedings *in rem* that the decree with respect to the *res*, whether it be a vessel, a tract of land or the marriage relation, is entitled to be respected in every other State or country. The *status* fixed by the adjudication in the State of the former is operative everywhere. Indeed, the proposition is so elementary as not to need the citation of an authority.

The conclusion of the argument is that, the courts of New York having the same power to decree a dissolution of the marriage at the suit of the wife, that the courts of Connecticut would have to make a similar decree at the suit of the husband, it would become a mere race of diligence between the parties in seeking different forums in other States; or the celerity by which in such States judgments of divorce might be procured, would have to be considered in order to decide which forum was controlling. Granting this to be the case, does not every plea of *res adjudicata* presuppose a prior judgment, and is it a defense to such plea that such judgment was obtained by superiority of a race of diligence? The whole doctrine is founded, if not upon the doctrine of superior diligence, at least upon the theory of a prior judgment, which fixes irrevocably the rights of the parties, whenever and wherever these rights may come in question. Nor is the rule less operative where suits are in different States and the laws applicable to the questions therein arising are different. To illustrate: Suppose a note and mortgage were given for usurious interest, and the mortgage was sought to be foreclosed in a State where, by statute, usury would invalidate both principal and interest, and a decree were obtained dismissing the bill, can it be doubted that if the note were sued upon in another State where usury did not invalidate the security the plea of *res adjudicata* would be sustained upon the ground that the rights of the parties had been definitely fixed in the suit for the foreclosure of the mortgage? It seems to me the same rule applies in this case. So long as no proceedings are taken, the marriage would remain valid both by the laws of Connecticut and of New York. But if a suit be instituted by either party, by the husband for a divorce or by the wife for a maintenance, and the question of marriage or no marriage be made an issue, and decided in the case first brought, that decree is forever binding upon both parties. Had the wife in this case brought suit to dissolve the marriage, or for a maintenance in affirmation of the marriage, the decree of the court in New York would have been as binding upon the court in Connecticut as the decree obtained in Connecticut ought to be upon the wife in New York.

The cases in the state courts, with a few exceptions, hereinafter noted, overwhelmingly preponderate in holding that where the plaintiff has acquired a *bona fide* domicil in a particular State he may lawfully appeal to the courts of that State for a dissolution of the marriage tie, for the causes permitted by its statutes, and may call in the non-resident defendant by publication. To abstract all these cases would unduly prolong this opinion.

In many of them the full faith and credit clause of the Constitution does not seem to have been called to the attention of the court, and the case was disposed of upon principles of comity, which give to the court a certain latitude of discretion, whereas, under the full faith and credit clause, the consideration given to a decree in the State where it is rendered is obligatory in every other State.

One of the earliest of these cases is that of *Harding* v. *Alden*, 9 Maine, 140, in which the parties separated, the husband going to North Carolina and the wife to Rhode Island. She began proceedings there, which culminated in a divorce for adultery committed in North Carolina, the husband having been personally cited to appear, but refusing to do so. The divorce was held to be valid, the court observing that "the protection of innocent parties and the purity of public morals require that divorces lawfully pronounced in one jurisdiction, and the new relations thereupon formed, should be recognized as operative and binding everywhere," in the absence of fraud or collusion. The ruling was that the wife was entitled to dower in lands of which the husband was seized during coverture, the statute expressly giving the right where divorce was decreed for the cause of adultery, as if the husband were dead.

In *Barber* v. *Root*, 10 Massachusetts, 260, the parties originally domiciled in Massachusetts removed to Vermont, and established a permanent domicil there. The court, while repudiating the idea that a divorce could be granted to a person who was not domiciled in Vermont, held the divorce to be good.

In *Hood* v. *Hood,* 11 Allen, 196, a divorce obtained in Illinois by the husband for desertion, upon notice by publication in a newspaper, was held to be valid as against the wife, although she was then living in Massachusetts under an agreement on his part to pay her a certain sum per week; and although she had no actual notice of the proceedings, and was not in Illinois during the pendency thereof. It was further held that she could not, in a libel for divorce brought by her in Massachusetts, offer evidence that the Illinois decree was obtained by fraud, and upon facts which would not entitle her to a divorce in Massachusetts. In a subsequent case between the same parties, 110 Massachusetts, 463, the court again decided that the Illinois decree could not be impeached, and that she was not entitled to dower in any lands of which the husband was seized during the coverture.

The whole subject was very carefully considered in *Burlen* v. *Shannon*, 115 Massachusetts, 438, which was an action against the husband for board furnished the wife. The husband, whose wife was living apart from him without justifiable cause, removed to Indiana, acquired a domicil there and obtained a decree of divorce by publication, and by leaving a summons at her abode in Massachusetts. The divorce was held to be valid in Massachusetts as to all persons, although the wife had never been in Indiana, never appeared in the suit there, had no knowledge that her husband contemplated going to that State, or had left Massachusetts, until after he had filed his libel for divorce. The authorities are reviewed by Mr. Justice Gray, and the conclusion reached that the divorce in Indiana was valid.

*Cummington* v. *Belchertown,* 149 Massachusetts, 223, was an action to recover expenses incurred by the plaintiff for the support of an insane pauper. The husband had removed to another State and procured a decree annulling the marriage on the ground of fraud in concealing from him the fact of insanity before their marriage. Notice of the proceedings was served upon her, but she was not represented, and it was held that the decree was insufficient to annul her marriage in Massachusetts. It was held, under the familiar rule that the jurisdiction of the foreign court may be inquired into, that the wife, when the proceedings were commenced and concluded was utterly insane, and that the record of the New York courts showed her to have been so, and that no guardian was appointed. The case was disposed of as one over which the New York court had acquired no jurisdiction. It does not qualify in any way the previous case of *Burlen* v. *Shannon.*

The case of *Ditson* v. *Ditson,* 4 R. I. 87, is directly in point, and I understand it to be so admitted. It was held that a divorce in Rhode Island on the ground of desertion was valid, though the husband had never been within the jurisdiction of Rhode Island, and only constructive notice of the pendency of the petition had been given him.

The rule in Kentucky is settled in *Rhyms* v. *Rhyms,* 7 Bush. 316, in which a wife proceeded against her husband as a nonresident by a warning order, and it was held that the court had jurisdiction to grant her a divorce, Chief Justice Robertson remarking: "It would be a reproach to our legislation if a faithless husband in Kentucky could by leaving the State deprive his abandoned wife of the power to obtain a divorce at home." In *Hawkins* v. *Ragsdale,* 80 Kentucky, 353, it was held that a divorce obtained by the husband in Indiana by constructive service determined the *status* of the party in Kentucky, and that under the statutes of that State it barred all claim to curtesy or dower in Kentucky lands. To the same effect is *Perzel* v. *Perzel,* 91 Kentucky, 634.

The law of California is settled in *In re Newman,* 75 California, 213, to the effect that a suit for divorce, so far as it affects the *status* of the parties and the custody of their children, is a proceeding *in rem,* and service by publication on a nonresident defendant is good. This ruling was repeated in *In re James,* 99 California, 374, where it is declared that such decree is equally valid in other States.

Nowhere is the rule more strongly asserted than in Tennessee, where a decree obtained in Illinois by publication was sustained in *Thoms* v. *King,* 95 Tennessee, 60, and where it seems to have been held that the decree could not be impeached, even by showing the absence of necessary residence.

In *Cooper* v. *Cooper,* 7 Ohio St. 594, it was held that a divorce granted in Indiana precluded an application for a divorce and alimony in Ohio. In *Cox* v. *Cox,* 19 Ohio St. 502, the validity of a foreign decree of divorce obtained by constructive service, except so far as regarded the question of alimony, was sustained. The same ruling was made in *Doerr* v. *Forsythe,* 50 Ohio St. 726, holding that while the Indiana divorce was good, it did not affect the property rights of the wife in the State of Ohio.

The rule in Missouri is stated in *Gould* v. *Crow*, 57 Missouri 200, that a divorce regularly obtained by the husband in Indiana on an order of publication operates as a divorce in his favor in Missouri, so as to prevent his wife from claiming dower in lands owned by him in that State. The decree so pronounced is a judgment *in rem* and is valid everywhere under the Constitution and laws of the United States. A like ruling was made in *Anthony* v. *Rice*, 110 Missouri, 223.

The law in Kansas is settled in *Rogers* v. *Rogers*, 56 Kassas, 483, to the effect that the courts of a sister State may dissolve a marriage relation between a husband domiciled there, and a wife domiciled in Kansas, by publication, although unknown to her; but that such courts have no power to settle the title of lands in Kansas or control the custody of children residing there. But it was also decided in *Chapman* v. *Chapman*, 48 Kansas, 636, that a wife having obtained a divorce in Ohio upon service by publication, was not entitled to dower in lands in Kansas fraudulently conveyed by her husband in fraud of her or others.

In *Smith* v. *Smith*, 43 La. Ann. 1140, it is held that a wife may acquire a separate domicil from that of her husband where his conduct has been such as to furnish ground for divorce, and her marriage *status* becomes subject to the jurisdiction of that domicil, and that the courts thereof may grant a divorce upon actual or constructive notice. The rights of the Louisiana courts to decree a divorce against an absentee by means of substituted service is again affirmed in *Butler* v. *Washington,* 45 La. Ann. 279.

The law of Wisconsin is the same. *Shafer* v. *Bushnell,* 24 Wisconsin, 372; *Cook* v. *Cook,* 56 Wisconsin, 195, though in the latter case the right of the wife to an interest in her husband's lands in Wisconsin was preserved.

In *Thompson* v. *State,* 28 Alabama, 12, the right of the husband to emigrate and acquire a new domicil and procure a divorce upon publication in the State of his domicil, was also affirmed. See also *Turner* v. *Turner,* 44 Alabama, 437. In the latter case it is indicated that a foreign divorce did not settle the rights of the wife to dower in his lands, or any other interests of a pecuniary character.

In *Kline* v. *Kline,* 57 Iowa, 386, a decree rendered in another State on service by publication was recognized, except so far as it attempted to fix the custody of the minor children. In *Van Orsdal* v. *Van Orsdal*, 67 Iowa, 35, the property rights of the wife were recognized, but this right was limited to property within the State, and which the husband owned at the time of the divorce, and not to what he subsequently acquired. In this case it was said: "The divorce was granted . . . in May, 1880. In November, 1881, the defendant's father died in this State, possessed of certain property which the defendant inherited. Now, while it may be that the plaintiff might be entitled to alimony if the defendant had owned property in the State at the time the divorce was procured in Nebraska, she cannot be so entitled because he has subsequently acquired property. The plaintiff, if entitled to alimony, was so entitled at the time the divorce was granted. The relation of husband and wife then ceased, and neither party is entitled to any share or interest in property which may be subsequently acquired."

In Indiana the right of a wife domiciled there to a divorce against the husband who never resided in that State, and upon whom service was only obtained by publication, is recognized in *Tolen* v. *Tolen,* 2 Blackford, 407; *Hood* v. *State,* 56 Indiana, 263, and in *Hilbish* v. *Hattle,* 145 Indiana, 59, it was held that the wife had no rights in his property by virtue of her marriage relations with the husband, though the court did not in the divorce proceedings adjudicate the property rights of the parties.

In *Garner* v. *Garner,* 56 Maryland, 127, the power to grant a divorce against a non-resident, upon whom process had not been served, was recognized, but the right to a decree that the non-resident should not marry again was denied.

In *Thurston* v. *Thurston*, 58 Minnesota, 279, the divorce was recognized, though process was served outside of the State. But it was held that the question of alimony was not *res adjudicata* by reason of the judgment. The wife was allowed alimony out of property in Minnesota.

The validity of foreign divorces obtained without personal service is recognized in Illinois, in *Knowlton* v. *Knowlton*, 155 Illinois, 158, and in *Dunham* v. *Dunham*, 162 Illinois, 589.

The law in New Jersey appeared at one time to favor the contention of the wife in this case. The gist of the decisions seemed to be that a foreign decree is enforceable in another State only on the ground of comity. This was indicated in *Doughty* v. *Doughty*, 28 N. J. Eq. 581, though the decree in that case was held to have been obtained by fraud. It was admitted that the decree obtained by the husband in Illinois was lawful and binding there, but it was held that it did not change the *status* of the wife in New Jersey, her citizenship there being admitted. The case was properly decided on the ground that the husband went to Illinois to obtain a divorce, and acquired no *bona fide* domicil there. The same rule was recognized in *Flower* v. *Flower*, 42 N. J. Eq. 152. These cases, however, seem to have been overruled in *Felt* v. *Felt*, 59 N. J. Eq. 606, where it was held that the domicil of the complainant in a foreign State was sufficient to give jurisdiction, notwithstanding the defendant had not been served with process there. The court remarked in this case: "A condition of the law which makes the intercourse of a man and woman either legitimate or adulterous as they happen to be within the limits of one State or another is not to be tolerated any further than is plainly required by public policy." This case evidently puts New Jersey in line with the vast majority of other States.

The cases of New York upon this subject are numerous and perhaps not wholly reconcilable, but we think that the law, as summarized in the last case of *Winston* v. *Winston*, 165 N. Y. 553, is adverse to the validity of a divorce obtained in another State without service of process within the jurisdiction. Of the same tenor are the cases in Pennsylvania: *Colvin* v. *Reed*, 55 Pa. St. 375; *Reel* v. *Elder*, 62 Pa. St. 308. North Carolina: *Irby* v. *Wilson*, 1 Dev. & Bat. Eq. 568; *Harris* v.

*Harris*, 115 N. Car. 587. South Carolina: *McCreery* v. *Davis*, 44 S. Car. 195.

The law in this country then may be summarized as follows: In Maine, Massachusetts, Rhode Island, Kentucky, California, Tennessee, Ohio, Missouri, Kansas, Louisana, Wisconsin, Alabama, Iowa, Indiana, Maryland, Minnesota, Illinois and New Jersey, the validity of a divorce obtained in another State by a party there domiciled in a proceeding where constructive service upon the defendant only is obtained, is fully recognized. In Ohio, Iowa and Minnesota, and perhaps also Louisiana and Alabama, her right to alimony and to dower is preserved. But the very cases which limit the effect of the divorce, so far as property rights are concerned, restrict such rights to dower in lands of which the husband was seized during coverture, and inferentially at least to alimony from such property. It is also limited to property within the State where suit is brought. That her rights in her husband's property should extend to property acquired by him long after the divorce is nowhere indicated.

The only States in which it is held that a party domiciled in another State may not obtain a divorce there by constructive service are New York, Pennsylvania, North and South Carolina.

A proceeding for divorce is a suit *in rem*, with which is often incorporated a suit *in personam*. The *res* is aptly stated in *Illis* v. *Martin*, 53 Missouri, 575, as "the *status* of the plaintiff *in relation to the defendant* to be acted on by the court. This relation being before the court in the person of the plaintiff, the court acts on it, and dissolves it by a judgment of divorce." The fact subsequently ascertained, that it may have been procured by fraud or false testimony, is wholly beside the question, as we shall hereafter show. The fact that the husband changed his domicil to another State, after the cause of action arose, is also immaterial. The *status* of the husband in this case was irrevocably fixed by the decree. It is unnecessary to consider how far it affected the *status* of the wife in New York, which, in respect to other questions, may be subject to the local law; but her relations as against her husband are controlled by the decree which fixed *his status*. Indeed, it would be a reproach to our jurisprudence if an injured party residing in one State could not obtain a decree from the other party, without pursuing the offending party into another and distant State, where he or she may have chosen to establish a domicil.

In this case the referee reported that the defendant abandoned the plaintiff without cause or justification. An exception was taken to this report, and the testimony was sent up, which shows that the parties separated on the day of their marriage and have never lived together since. The testimony leaves it doubtful whether it was a case of abandonment or of separation by mutual consent. It does, however, show that plaintiff took no steps to assert her martial rights for twenty-six years after her marriage. Her husband having in the meantime inherited a large amount of property from his father, she began suit for divorce *a mensa et thoro* and an allowance of alimony. This suit, however, was ineffectual so far as respects the alimony, as no personal service was obtained. She waited again for five years and began this proceeding both for a separation, which she had already obtained, and for alimony.

We think the defendant may lawfully reply thus: "You are pursuing me as your husband for a separation *de jure* which has existed for thirty-one years *de facto*, and since 1894 *de jure*, and for an alimony which is obviously the sole object of your proceeding. Your only claim against me is as your husband. I am not your husband. Twenty-three years ago the Superior Court of Litchfield County, Connecticut, in which State I had an actual and *bona fide* domicil, and which had had sole jurisdiction over my marital *status* for twelve years, liberated me from the bonds of matrimony and pronounced me a free man. In the meantime I have married another woman, and if your position be a sound one, I am, at least in the State of New York, a bigamist, and my wife an adulteress." It is difficult to conceive of a case calling more loudly for the application of the general doctrine.

As no question is made as to the validity of the Connecticut decree and its legal effect in that State, and as this court has repeatedly decided that, under the full faith and credit clause of the Constitution, a judgment conclusive in the State where it is rendered is equally conclusive everywhere in the courts of the United States, *Cheever* v. *Wilson*, 9 Wall. 108; *Mills* v. *Duryee*, 7 Cranch, 481; *D'Arcy* v. *Ketchum*, 11 How. 165, I do not understand how this decree can be denied the same effect in New York that it has in Connecticut without disregarding the constitutional provision in question. The result is that the husband, freed from the bonds of matrimony in Connecticut, was at liberty to contract another marriage there, while the wife cannot even at this late day contract another marriage in New York without being guilty of adultery.

3. It is insisted, however, that the decree of the Connecticut court was obtained by the fraud of Haddock, in stating in his complaint that his wife had deserted him, when, in the present case, it appears from his own testimony that he, in fact, abandoned and refused to live with her, or that they separated by mutual consent.

The evidence upon which the Connecticut decree was granted does not appear in the record, and it is possible that the case was made out by the testimony of other witnesses. But, however that may be, this decree cannot be impeached by evidence that it was obtained by false testimony, even though it be testimony of the plaintiff in that proceeding and the defendant in this. *Hood* v. *Hood,* 11 Allen, 196, in which it was held that "both parties had their domicil in that State [Illinois], and were subject to the jurisdiction of the court in which the libel was filed. . . . But the fact of desertion [by the wife] was conclusively settled between the parties by the judgment in Illinois; and it is not now competent for the libellant to contradict that judgment." See same case, 110 Massachusetts, 463.

The rule is well settled that while a judgment or decree may sometimes be impeached for fraud, it can only be for a fraud extrinsic to the cause—as, that the judgment was collusively obtained to defraud some other person, and that it cannot be impeached by either of the parties thereto by reason of false testimony given at the time, or which must have been given to establish the plaintiff's case, or even by perjury of one of the parties thereto. Granting that the testimony shows the absence of good faith, and even perjury, on the part of the husband in the Connecticut suit, the decree cannot be opened for that reason, or for any reason, which would not logically involve a reëxamination of the entire facts upon which the decree is obtained. *Christmas* v. *Russell,* 5 Wall. 290; *United States* v. *Throckmorton,* 98 U. S. 61; *Sims* v. *Slocum,* 3 Cranch, 300; *Ammidon* v. *Smith,* 1 Wheat. 447; *Smith* v. *Lewis,* 3 Johns. 157; *Marriott* v. *Hampton,* 7 T. R. 269; *Demerit* v. *Lyford,* 7 Foster, 514, 546; *Peck* v. *Woodbridge,* 3 Day, 30;

*Dilling* v. *Murray,* 6 Indiana 324; *Homer* v. *Fish*, 1 Pick. 435; *Lewis* v. *Rogers*, 16 Pa. St. 18; *Sidensparker* v. *Sidensparker*, 52 Maine, 481; *B. & W. R. R. Company* v. *Sparhawk*, 1 Allen, 448; *Damport* v. *Sympson*, Croke, Eliz'bth, 520; *Eyres* v. *Sedgwicke*, Croke, James, 601; *Mason v. Messenger,* 17 Iowa, 261, 272; *White v. Merritt,* 7 N. Y. 352.

When it is considered that the status of the defendant was fixed by the decree of the Connecticut court in 1881, in a proceeding of which his wife had due notice, that upon the faith of this decree he remarried the following year, and that the plaintiff made no move to establish her conjugal rights for thirteen years thereafter, and for twenty-six years after her marriage, the injustice of holding all these proceedings to be null and void, even upon the assumption of perjury committed by the defendant, becomes the more manifest. We think that at least the record should have been received.

I regret that the court in this case has taken what seems to me a step backward in American jurisprudence, and has virtually returned to the old doctrine of comity, which it was the very object of the full faith and credit clause of the Constitution to supersede.

MR. JUSTICE HOLMES, with whom concurred MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE BROWN, dissenting.

I do not suppose that civilization will come to an end whichever way this case is decided. But as the reasoning which prevails in the mind of the majority does not convince me, and as I think that the decision not only reverses a previous well-considered decision of this court but is likely to cause considerable disaster to innocent persons and to bastardize children hitherto supposed to be the offspring of lawful marriage, I think it proper to express my views. Generally stated, the issue is whether, when a husband sues in the court of his domicil for divorce from an absent wife on the ground of her desertion, the jurisdiction of the court, if there is no personal service, depends upon the merits of the case. If the wife did desert her husband in fact, or if she was served with process, I understand it not to be disputed that a decree of divorce in the case supposed would be conclusive, and so I understand it to be admitted that if the court of another State on a retrial of the merits finds them to have been decided rightly its duty will be to declare the decree a bar to its inquiry. The first form of the question is whether it has a right to inquire into the merits at all. But I think that it will appear directly that the issue is narrower even than that.

In *Atherton* v. *Atherton,* 181 U. S. 155, a divorce was granted, on the ground of desertion, to a husband in Kentucky against a wife who had established herself in New York. She did not appear in the suit and the only notice to her was by mail. Before the decree was made she sued in New York for a divorce from bed and board, but pending the latter proceedings the Kentucky suit was brought to its end. The husband appeared in New York and set up the Kentucky decree. The New York court found that the wife left her husband because of his cruel and abusive treatment, without fault on her part, held that the Kentucky decree was no bar and granted the wife her divorce from bed and board. The New York decree, after being affirmed by the Court of Appeals, was reversed by this court on the ground that it did not give to the Kentucky decree the faith and credit which it had by law in Kentucky. Of course, if the wife left her husband because of his cruelty and without fault on her part, as found by the New York court, she was not guilty of desertion. Yet this court held that the question of her desertion was not open but was conclusively settled by the Kentucky decree.

There is no difference, so far as I can see, between *Atherton* v. *Atherton* and the present case, except that in *Atherton* v. *Atherton* the forum of the first decree was that of the matrimonial domicil, whereas in this the court was that of a domicil afterwards acquired. After that decision any general objection to the effect of the Connecticut decree on the ground of the wife's absence from the State comes too late. So does any general objection on the ground that to give it effect invites a race of diligence. I therefore pass such arguments without discussion, although they seem to me easy to answer. Moreover, *Atherton* v. *Atherton* decides that the jurisdiction of the matrimonial domicil, at least, to grant a divorce for the wife's desertion without personal service, does not depend upon the fact of her desertion, but continues even if her husband's cruelty has driven her out of the State and she has acquired a separate domicil elsewhere upon the principles which we all agree are recognized by this court.

I can see no ground for giving a less effect to the decree when the husband changes his domicil after the separation has taken place. The question whether such a decree should have a less effect is the only question open, and the issue is narrowed to that. No one denies that the husband may sue for divorce in his new domicil, or, as I have said, that if he gets a decree when he really has been deserted, it will be binding everywhere. *Hawkins* v. *Ragsdale*, 80 Kentucky, 353, cited 181 U. S. 162. *Cheely* v. *Clayton*, 110 U. S. 701, 705. It is unnecessary to add more cases. The only reason which I have heard suggested for holding the decree not binding as to the fact that he was deserted, is that if he is deserted his power over the matrimonial domicil remains so that the domicil of the wife accompanies him wherever he goes, whereas if he is the deserter he has no such power. Of course this is a pure fiction, and fiction always is a poor ground for changing rights. It seems to me also an inadequate fiction, since by the same principle, if he deserts her in the matrimonial domicil, he is equally powerless to keep her domicil there, if she moves into another State. The truth is that jurisdiction no more depends upon both parties having their domicil within the State, than it does upon the presence of the defendant there, as is shown not only by *Atherton* v. *Atherton*, but by the rights of the wife in the matrimonial domicil when the husband deserts.

There is no question that a husband may establish a new domicil for himself, even if he has deserted his wife. Yet in these days of equality I do not suppose that it would be doubted that the jurisdiction of the court of the matrimonial domicil to grant a divorce for the desertion remained for her, as it would for him in the converse case. See *Cheever* v. *Wilson*, 9 Wall. 108. Indeed in *Ditson* v. *Ditson*, 4 R. I. 87, which, after a quotation of Judge Cooley's praise of it, is stated and relied upon as one of the pillars for the decision of *Atherton* v. *Atherton*, a wife was granted a divorce, without personal service, in the State of a domicil acquired by her after separation, on the sole ground that in the opinion of the court its decree would be binding everywhere. If that is the law it disposes of the case of a husband under similar circumstances, that is to say of the present case, *a fortiori;* for I suppose that the notion that a wife can have a separate domicil from her husband is a modern idea. At least *Ditson* v. *Ditson*, confirms the assumption that jurisdiction is not dependent on the wife's actually residing in the same State as her husband, which has been established by this court. *Atherton* v. *Atherton,* 181 U. S. 155; *Maynard* v. *Hill,* 125 U. S. 190; *Cheever* v. *Wilson,* 9 Wall. 108. When that assumption is out of the way, I repeat that I cannot see any ground for distinguishing between the extent of jurisdiction in the matrimonial domicil and that, admitted to exist to some extent, in a domicil later acquired. I also repeat and emphasize that if the finding of a second court, contrary to the decree, that the husband was the deserter, destroys the jurisdiction in the later acquired domicil because the domicil of the wife does not follow his, the same fact ought to destroy the jurisdiction in the matrimonial domicil if in consequence of her husband's conduct the wife has left the State. But *Atherton* v. *Atherton* decides that it does not.

It is important to bear in mind that the present decision purposts to respect and not to overrule *Atherton* v. *Atherton.* For that reason, among others, I spend no time in justifying that case. And yet it appears to me that the whole argument which prevails with the majority of the court is simply an argument that *Atherton* v. *Atherton* is wrong. I have tried in vain to discover anything tending to show a distinction between that case and this. It is true that in *Atherton* v. *Atherton,* Mr. Justice Gray confined the decision to the case before the court. Evidently, I should say, from internal evidence, in deference to scruples which he did not share. But a court by announcing that its decision is confined to the facts before it does not decide in advance that logic will not drive it further when new facts arise. New facts have arisen. I state what logic seems to me to require if that case is to stand, and I think it reasonable to ask for an articulate indication of how it is to be distinguished.

I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis. When a crime is made burglary by the fact that it was committed thirty seconds after one hour after sunset, ascertained according to mean time in the place of the act, to take an example from Massachusetts (R. L. c. 219, § 10), the act is a little nearer to midnight than if it had been committed one minute earlier, and no one denies that there is a difference between night and day. The fixing of a point when day ends is made inevitable by the admission of that difference. But I can find no basis for giving a greater jurisdiction to the courts of the husband's domicil when the married pair happens to have resided there for a month, even if with intent to make it a permanent abode, than if they had not lived there at all.

I may add, as a consideration distinct from those which I have urged, that I am unable to reconcile with the requirements of the Constitution, Article 4, section 1, the notion of a judgment being valid and binding in the State where it is rendered, and yet depending for recognition to the same extent in other States of the Union upon the comity of those States. No doubt some color for such a notion may be found in state decisions. State courts do not always have the Constitution of the United States vividly present to their minds. I am responsible for language treating what seems to me the fallacy as open, in *Blackinton* v. *Blackinton*, 141 Massachusetts, 432, 436. But there is no exception in the words of the Constitution. "If the judgment is conclusive in the State where it was pronounced it is equally conclusive everywhere." *Christmas* v. *Russell*, 5 Wall. 290, Marshall, C. J., in *Hampton* v. *McConnel*, 3 Wheat. 234; *Mills* v. *Duryee*, 7 Cranch, 481, 485; Story, Const. § 1313. See also *Hancock National Bank* v. *Farnum*, 176 U. S. 640, 644, 645. I find no qualification of the rule in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265. That merely decided, with regard to a case not within the words of the Constitution, that a state judgment could not be sued upon when the facts which it established were not a cause of action outside the State. It did not decide or even remotely suggest that the judgment would not be conclusive as to the facts if in any way those facts came in question. It is decided as well as admitted that a decree like that rendered in Connecticut in favor of a deserting husband is binding in the State where it is rendered. *Maynard* v. *Hill*, 125 U. S. 190. I think it enough to read that case in order to be convinced that at that time the court had not thought of the divorce being confined in its effects to the Territory where it was granted, and enough to read *Atherton* v. *Atherton* to see that its whole drift and tendency now are reversed and its necessary consequences denied.

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